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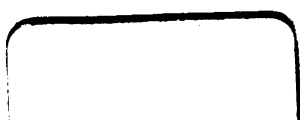
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THE LAW
OF
RECEIVERSHIPS

AS ESTABLISHED AND APPLIED
IN THE UNITED STATES, GREAT
BRITAIN AND HER COLONIES,

WITH
PROCEDURE AND FORMS

BY
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OF THE CHICAGO BAR

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PREFACE.

Perhaps no other branch of the law more forcibly illustrates the constant and steady growth of remedial jurisprudence, and its adaptation to the ever changing conditions of business institutions and methods than that of receivership. The crowning feature of equity jurisprudence, in general, is its power under all circumstances of meteing out even and exact justice *ex foro conscientie* to all parties in interest, untrammled by legal forms and distinctions. It draws to itself all parties and interests, and gives to each protection *pendente lite*, adjudicates and determines their equitable rights and enforces them to the extent of the property or fund subject to distribution. The basic principle in the law of receivership is in the power of the chancellor, though a receiver, to seize property, the subject-matter of litigation, preserve it pending suit, and finally distribute the same, or the proceeds, according to the equitable rights of the parties concerned. As it is the inefficiency of the common law remedies that affords a field for the exercise of chancery jurisdiction, so the latter is rendered more efficient, comprehensive and expeditious by the aid of the law of receivership. It has been said that receivership is of recent origin, but it is more correct to say that its extended application is comparatively recent. The great increase in recent years in the number of private corporations, caused by the advantages of concentrated capital, has been instrumental in largely extending the law of receivership. This growth has been augmented by the difficulties encountered by the courts through the ordinary avenues and instrumentalities in affording adequate relief under the varied and conflicting interests involved. The difficulties thus encountered developed the law of corporate receivership, and its extension in this direction has had a stimulating effect in its application to other equitable proceedings, such as creditor's actions, partnership dissolutions and mortgage foreclosures.

It has been the purpose of the writer to indicate as carefully, briefly and consisely as possible the scope of the law of receivership as it now exists, in its application to the several proceedings in which it has been employed. At the same time it has been deemed of equal importance to indicate, in the same manner, the limita-

tions and restrictions courts have deemed necessary to impose upon the exercise of jurisdiction in this regard.

An earnest effort has been made to discover and state the underlying principles by which the courts have been governed in establishing any given proposition or doctrine, in the belief that the mere abstract statement of the law upon any subject is more effective and of greater utility to the court and practitioner if in the same connection may be seen the principles upon which a decision is based, and the leading facts upon which it is made. But for this the notes herein would seem out of proportion.

It is a fruitless task, in some cases, to attempt to reconcile conflicting decisions, but generally a careful examination will show differentiating facts and circumstances in the cases or lines of cases, and this results in the establishment of general rules and exceptions which have been followed out herein as carefully as possible. Equitable principles are seldom matters of dispute, but the application of those principles to the varying facts and circumstances arising in litigation taxes courts and lawyers to the utmost.

If we have not been mistaken the profession demands in a textbook not only the carrying out of the principles above indicated, but also insists upon a reference to all the decided cases. It may be that the case requires, and the time at the lawyer's disposal justifies, a personal examination of all the adjudged cases upon the questions involved.

Having prepared this work along the lines thus indicated, the author trusts it may meet the requirements of the profession.

J. W. S.

Chicago, Feb. 15, 1897.

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LAW OF RECEIVERSHIPS.

CHAPTER I

GENERAL NATURE AND FEATURES OF THE LAW.

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§ 1. Origin of the law; its growth.

The law of receiverships, like all other branches of remedial jurisprudence, is a growth, an evolution, and, in its application, has for its purpose the protection and preservation of the property which forms the subject-matter of the litigation, until the final adjudication of the rights of the parties litigant. In its original exercise the appointment of a receiver was purely an incidental power of the court of chancery, put into operation as part and parcel of the great body of equitable jurisprudence, intended to secure justice by more complete and adequate remedies where the strict and unelastic rules and practice prevailing in the common law courts were insufficient.¹

This branch of the law, however, has grown along with the other branches of equitable jurisdiction and has been extended and brought into exercise in nearly every species of chancery proceeding, as well as in many common law actions. Perhaps no other branch of jurisprudence more fitly represents the grad-

¹ Chancellor Bland in 1826 says: "It is a power of the court of chancery of England which appears to have been frequently called into action during more than a century past. All the leading principles in relation to it were well established there long before our revolution; and it was then, and has ever since been considered, there and here, as a power of as great utility as any which belongs to a court of chancery. And that it is so will appear very evident from a review of the nature and the variety of the exigencies in which it has been called into action,

either to prevent fraud, to save the subject of litigation from material injury, or to rescue it from inevitable destruction." *Williamson v. Wilson*, 1 Bland, Ch. 418. See also *Myers v. Estell*, 48 Miss. 401; *Beverley v. Brooke*, 4 Gratt. 187 (208). Vice Chancellor Giffard, in *Hopkins v. Worcester & B. Canal Co.* L. R. 6 Eq. 437, 447, says in regard to the appointment of receivers: "That is one of the oldest remedies in this court," and is a remedy which a court of chancery will always grant *ex debito justitia*, upon a proper showing.

ual growth and adaptation of equitable principles to the ever changing conditions of social progress and civil and commercial advancement.

Especially has the law of receiverships been put into operation and its efficient remedial action been fully demonstrated in the winding up of corporations and the administration of their assets. By several acts of Parliament, in England, and statutory enactments in nearly all of the states in this country the original law of receiverships as administered in the courts of chancery, and those exercising chancery powers, has been enlarged in its scope and extended in its application to many subjects not theretofore embraced in its exercise, and the powers, duties, and liabilities of the receiver have been largely increased. Much of this legislation, however, has been but placing in statutory form the principles of equity jurisdiction and practice existing long prior thereto.

§ 2. Is ancillary and provisional.

The law of receiverships is peculiar in its nature in that it belongs to that class of remedies which are wholly ancillary or provisional, and the appointment of a receiver does not affect, either directly or indirectly, the nature of any primary right but is simply a means by which primary rights may be more efficiently preserved, protected, and enforced in judicial proceedings. It adjudicates and determines the rights of no party to the proceeding and grants no final relief directly or indirectly.¹ In this respect its effects are analogous to the law in relation to injunction and interpleader, and sometimes, as will be seen, an injunction will afford an adequate remedy without interfering with the possession of the property. It leaves the parties as they have placed themselves, as determined by the final judgment or decree of the court.

§ 3. Receiver defined; liquidators.

A receiver may be defined as a person appointed by the court, as a *quasi* officer or representative of the court, and therefore occupying a disinterested position as between the parties, whose function it is to hold, manage, control, and deal with the property

¹ Pom. Eq. Jur. §§ 171, 1819, 1830;
Miller v. Bowles, 58 N. Y. 258.

which is the subject-matter of, or involved in the litigation; in case there is no person entitled competent to thus hold it; or, where two or more litigants are equally entitled, but it is not just and proper, under existing circumstances, that either of them should retain it under his control; or where a person is legally entitled to the possession, but there is danger of his misapplying or misusing it; or, under some particular circumstances, in suits to foreclose mortgages.¹ A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it.²

Under the provisions of section 92, chapter 89 of the Companies act of 1862 provision is made in England for the appointment of a liquidator or liquidators, for the purpose of the winding up of companies and associations thereunder: (1) When the company has passed a resolution requiring the company to be wound up; (2) when the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; (3) when its members are reduced in number to less than seven; (4) when the company is unable to pay its debts; (5) whenever the court is of the opinion that it is just and equitable that the company should be wound up. The powers of the official liquidator under the above act are: (a) To bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company; (b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same; (c) power to sell the company's assets and effects; (d) to do all acts and to execute in behalf of the company all deeds, receipts, and other documents, and if necessary to use the company's seal; (e) and, generally, to do and perform all other acts and things that may be

¹ Pom. Eq. Jur. § 1230; Kerr, Receivers, p. 2.

² High, Receivers, 8d ed. § 1; *Booth v. Clark*, 58 U. S. (17 How.) 331, 15 L. ed. 167; *Hunter v. Peaks*, 74 Me. 368; Gluck & Becker Receivers, § 1; *Ex parte Jay*, L. R. 9 Ch. 133; *Baker v. Backus*, 32 Ill. 79; *Be-*

erley v. Brooks, 4 Gratt. 208; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Libby v. Rosekrans*, 55 Barb. 202; *Waters v. Carroll*, 9 Yerg. (Tenn.) 102; *Devendorf v. Dickinson*, 21 How. Pr. 275; *Harman v. McMullin*, 85 Va. 187; *Davis v. Duke of Marlborough*, 2 Swanst. 125.

necessary for winding up the affairs of the company and distributing its assets.' It is also provided by the act (§ 96) that the liquidator may exercise the above enumerated powers without the sanction or intervention of the court where the order for his appointment so provides. While it is true that the appointment of a liquidator, under the provisions of the above act, does not abolish the office of a receiver, and under peculiar circumstances receivers are still appointed by the courts, yet so far as corporations and associations embraced in the act are concerned, the official liquidator, with largely increased powers and duties, has superceded the receiver in England, but the functions of his office are such, and the decisions of the courts relating thereto so highly instructive and important, that they may be regarded and are treated herein as contributions to the general and growing body of the law of receiverships. Under the Winding-up Act of 1890, after an order has been made for winding up the company, the court has no power to appoint a provisional liquidator other than the official receiver.* As to the general power to appoint receivers, see Judicature Act of 1873.

In this country by the codes of civil procedure, and amendatory statutes in states not adopting the code practice, the functions, powers, and duties of the receiver have been greatly increased and extended, and especially so in their application to corporations, and the administration of their affairs in cases of insolvency, breach of corporate powers and duties, and the more effectual and speedy collection and distribution of assets.*

*Ch. 89, Vol. XIV. Rev. Stat. p. 202 (25 & 26 Victoria to 28 & 29 Victoria, A. D. 1862-1865).

**Re North Wales Gunpowder Co.* [1892] 2 Q. B. 220; under the Judicature Act of 1873, § 25, cl. 8, the court has most ample power in the appointment of receivers, and may do so whenever it is just or convenient, or as construed by the court, just and convenient. *North London Railway v. Great Northern, Railway* L. R. 11 Q. B. Div. 39.

*The statutory provisions of the several states applicable to the main

features of this subject are noted in this connection for reference merely.

Alabama: Code, § 1686.

Arkansas: Gantt's Dig. of Stat. (1874) §§ 4809, 4810; Sandell & Hill, Dig. of Stat. § 5964.

California: Code Civ. Proc. §§ 564, 565, 566.

Colorado: King's Code Civ. Proc. (1880) § 138; Mills' Ann. Code, § 163.

Connecticut: Gen. Stat. §§ 1818, 1819, 1820, 1821, 1822, 1942, 1852, 2828.

§ 4. Generally, in what cases appointed.

Independent of statutory provisions, a court of equity, or a common law court exercising equity powers, will appoint a receiver in four different classes of cases.

- Delaware: Laws, pp. 686, 715, 718.
 Florida: Code Civ. Proc. (1870) § 192; Rev. Stat. §§ 1211, 2107, 2154, 2157, 2192.
 Georgia: Code (1882) §§ 3098, 3149, 274, 1486, 3149a, 3216.
 Idaho: Rev. Stat. §§ 4329, 2479.
 Illinois: Hurd's Stat. 1895, chap. 32, § 25; chap. 78, § 15.
 Indiana: 2 Davis' Rev. (1876) § 199; Rev. Stat. 1894 (Burns), §§ 1236, 3435-3439, 4867-4870, 4954, 8125-8127.
 Iowa: 2 Miller's Rev. Code (1880), § 2903; McClain's Ann. Code, §§ 4113-4115, 4188, 4279, 4870, 1817, 457, 2585.
 Kansas: Dassel's Comp. Laws (1881), § 254; Gen. Stat. §§ 4590; 4591, 4849, 883.
 Kentucky: Bullitt's Code (1876), §§ 298, 299; Carroll's Code, 298, 218, 302.
 Maine: Rev. Stat. p. 406, §§ 46-48; 423, § 71; 432, § 121; 455, § 67; 457, § 76; 458, § 83; 478, §§ 47-49; Statutes, 1885-1895, 318, § 5.
 Maryland: Pub. Gen. Law, 389-391, §§ 268-275.
 Massachusetts: Pub. Stat. 569, § 42; Stat. 1883, chap. 223; Stat. 1882, chap. 22; Pub. Stat. 687, 837; Supp. Pub. Stat. 1882-1883, 180, 293, 513, 137, 543, 15, 124, 125.
 Michigan: Howell's Ann. Stat. §§ 4263, 4293, 4323, 6624, 7936, 8064, 8065, 8067, 8111, 8112, 8158, 8386, 8634, 8744, 8746, 8748, 8749c, Supp. 4323b, 4323a, 3251o.
 Minnesota: Stat. §§ 5212, 3432, 3434, 3435, 4241, 4246, 4810, 5492, 5897, 5899, 5906, 5972, 6238.
 Missouri: Rev. Stat. (1879) §§ 3116, 3660.
 Mississippi: Ann. Code, §§ 119, 574-582, 581.
 Montana: C. C. & Stat. Civ. Code, §§ 727, 830, 832; Code Civ. Proc. §§ 950-956, 2251.
 Nebraska: Comp. Stat. 1224, 1169, 1179, 121.
 Nevada: Gen. Stat. §§ 2997, 3168.
 New Jersey: Rev. of N. J. 187, §§ 60-62; 121, § 92; 189, § 72; 1281, § 1; 188, § 61; 189, § 72; 394, § 26; 1348, §§ 4, 5; 943, § 160; 196, § 106; Supp. 915, §§ 11-15.
 New York: Bliss' Ann. Code, 995-1002, 1014-1027, 2315-2322, 2331, 2745-2750.
 North Dakota: Rev. Code, §§ 5302, 5403, 5765, 5770, 5779, 5780, 5568-5570.
 North Carolina: Code Civ. Proc. 197, 290; Code, vol. 1, §§ 379, 663, 494.
 Ohio: Rev. Stat. §§ 5537, 5539, 7609, 7601, 8248, 5670, 5656, 5705, 5484, 3416.
 Oklahoma: Stat. §§ 4101-4106, 4144-4150; §§ 266-272.
 Oregon: Hill's Ann. L. 694, 695n, 696n, 697n, 698n, 699.
 Pennsylvania: Brightley's P. D. 427, 118; 1776, § 23.
 Rhode Island: Gen. L. 694-699.
 South Carolina: Gen. Stat. & Civ. Code; Code Civ. Proc. §§ 265, 318.
 Tennessee: Code, §§ 4518, 4716, 3716, 4162, 4516, 2735.
 Texas: Sayles' Tex. Civ. Stat., vol. 1, art. 1461-1469, 1470, 1470i.

(a) WHERE PARTIES ENTITLED TO CUSTODY ARE INCOMPETENT.

Where there is no person competent by reason of interest, or otherwise, to take the custody and management of the property which constitutes the subject-matter of judicial action. This may occur (1) in regard to infants' estates, where there is no trustee, and where there is no guardian, or if a guardian, by reason of inadequate power, he is unable to properly preserve, care for, or manage his ward's estate; (2) in regard to lunatics' estates, where no person will act as a committee or conservator; (3) in regard to decedents' estates, where by reason of litigation concerning the admission of the will to probate, or where by reason of delay, from whatever legal cause, in the appointment of an executor of the will or administrator of the estate, and where there is danger of loss, misapplication, or misuse of the property pending such delay.¹

(b) WHERE PARTIES ENTITLED TO CUSTODY ARE COMPETENT, BUT ARE OTHERWISE DISQUALIFIED.

Where all the parties may be equally entitled to the possession and custody of the property or fund, but where it is not proper, owing to the nature of the contention, or of the relation of the parties that either of them should have possession or custody.² This may occur: (1) in matters growing out of, or involved in the dissolution of a copartnership; (2) in partition proceedings between tenants in common; (3) between claimants to land under legal title, where gross fraud, great danger or violent possession is alleged.³

¹ Pomeroy's Equity Jur. § 1833.

² Mr. Pomeroy, in his Equity Jurisprudence (Vol. 3, § 1833), says that the second class of cases is based upon the fact that all the parties are clearly entitled to the possession of the property which is the subject-matter of the controversy, but it is not just and proper from the nature of the dispute and of their relations to each other that either of them should be allowed to retain the possession and control during the litigation. While the

foundation of the remedy is of course the danger, yet it is not always essential that there should be any element of actual fraud or breach of trust.

³ In *Delaware, L. & W. R. Co. v. Erie R. Co.* 21 N. J. Eq. 298, where two railway companies had agreed to use a railway station jointly, it is said that no doubt seems to have been entertained in *Shrewsbury R. Co. v. Chester R. Co.* 14 L. T. 217-433, that the court of chancery had power to prescribe rules for the use of such sta-

(c) WHERE PARTIES IN CUSTODY ARE VIOLATING FIDUCIARY DUTIES AND TRUST RELATIONSHIPS.

Where the person holding property occupies a position of trust, or a *quasi* trust relationship, and is violating his fiduciary duties by waste, misuse, or misapplication. This may occur: (1) in the case of trustees; (2) executors and administrators; (3) mortgagors in possession where the security is inadequate and the mortgagor is insolvent, or is committing waste; (4) judgment debtors where the judgment creditor has an equitable lien, but is unable to enforce his judgment by the ordinary process; (5) vendees of land in possession, where an action is brought to enforce a specific performance of the contract of sale; (6) purchasers of property where by reason of fraud an action is brought to rescind; (7) delinquents, in an action brought by annuitants to enforce payment of arrears; (8) life tenants in possession in an action by the remainderman usually founded on waste; (9)

tion and to appoint a receiver. See also the case of *Midland R. Co. v. Ambergate, N. & E. J. R. Co.* 10 Hare, 359. "In the case before me," the chancellor says, "these parties possess a common interest in this property. They are tenants in common of an easement, and if the court cannot protect the one against the injustice of the other, the party whose rights are invaded is clearly without any adequate remedy; for it is certain that either of these companies thus situated can so act with respect to the common easement as to render it worthless to the other and bring upon the other incalculable mischief. The general cognizance in equity in cases of this kind where property is enjoyed in common will not, it is presumed, be disputed by any one, and I can perceive no reason why this power should not exist where two railroads are such tenants in common, as well as in other cases. In truth, as these companies, although technically private corporations, are in some measure public

agents, there exists in such cases as the present an additional reason why a judicial control should be extended as far as possible over their conduct towards each other. I have no doubt as to the jurisdiction of this court over this subject, and I shall not scruple therefore to exercise it to the fullest extent that the circumstances of the case may now or at any other time hereafter appear to require."

In *Bank of Mississippi v. Duncan*, 52 Miss. 740, it is held that where the court takes the fund from a defendant pending litigation and afterwards becomes satisfied it cannot grant relief and dismisses the bill, it still has power to retain the bill for the purpose of repairing the injury.

In *Midland R. Co. v. Ambergate, N. & E. J. R. Co.* 10 Hare, 359, the court refused to restrain one railway company from using the station of another under an agreement which was made between the two companies.

See also *Shrewsbury R. Co. v. Chester R. Co.* 14 L. T. 217-433.

officers of a corporation in an action by stockholders charging mismanagement or acts *ultra vires*; (10) assignees and other persons in bankruptcy proceedings.¹

(d) WHERE THE ORDINARY PROCESS IS INSUFFICIENT.

4. Where, after the rendition of a judgment, it becomes necessary to carry into effect the judgment or decree of the court and in which the ordinary officers of the court, or the legally constituted authorities, cannot efficiently act or properly perform the duties imposed. This condition of things may occur: (1) in creditors' suits, supplementary proceedings, or proceedings in aid, which are designed to reach equitable interests where common law writs are inadequate, and where fraudulent conveyances and obstructions intervene; (2) in suits designed to reach the separate estate of married women, where such estate is not held by legal title, or is held by trustees for their separate use.² (3) Where statutory suits and proceedings are instituted for the purpose of winding up corporations and other associations of statutory origin by reason of their forfeiture of charter, insolvency, or acts *ultra vires*.³

There are many statutory proceedings where a receiver is provided for, and where his services are peculiarly efficient, as in winding up proceedings of corporations, by reason of insolvency or forfeiture of their charter. In such cases the receiver is selected by reason of his special fitness and qualifications for the

¹ Pomeroy, Eq. Jur. § 1834, and cases there cited. Under this topic the authorities are very numerous and are not here noted, but will be found under the sub topics in their proper connection hereafter.

² In speaking of this class of cases Mr. Pomeroy on Equity Jurisprudence (Vol. 3, § 1835) says in some instances a receiver appointed on motion pending the action is continued in his office after the decree. In others he is appointed after the decree when no appointment would be made until after the hearing. In all instances the object of a receiver is to carry into effect a special decree which

could not otherwise be efficiently executed by ordinary process. Among the most important cases in which a receiver may thus be appointed are creditors' suits, and suits to enforce equitable liens; suits to enforce the contracts of married women against their separate estates; and suits or proceedings, generally statutory, for the winding up of corporations. In the states adopting the reform procedure the code of procedure generally contains provisions for the appointment of a receiver.

³ See Receivers of Corporations, Railways, etc., chaps. XII. and XIV., *post*.

duties assigned to him, as well as the magnitude, frequently, of the business intrusted to his management, and where the ordinary officers of the law could not be expected to act with efficiency.

§ 5. Rules governing the appointment.

The exercise of the extraordinary power of the court in the appointment of a receiver is attended with such consequences, and may end in such extreme, not to say oppressive, results that judges and courts in all cases are extremely cautious in the administration of this branch of equity jurisdiction. In the appointment of a receiver, which operates in the nature of an equitable execution, and, in its effects, is practically a sequestration, there has been established certain well defined and salutary rules that operate as a protection to the parties whose interests are to be affected, and as a guide to the chancellor in making the appointment. These rules are well-nigh universal, and, it is believed that no case will arise where their recognition will be attended with other than useful results, both to the practitioner and the court. Being founded upon the experience and judgment of a large number of careful and discriminating judges, called upon to administer this branch of remedial jurisprudence, they cannot be otherwise than founded in justice, and a careful and discriminating regard for the rights and interests of the parties litigant is promoted thereby.

(a) APPOINTMENT RESTS IN THE SOUND DISCRETION OF THE COURT.

Independent of statutory enactments, the appointment of a receiver rests in the sound judicial discretion of the court, or chancellor, and as a result calls for the exercise on his part of the greatest care and circumspection.¹ Judicial discretion is not the

¹*Davis v. United States Electric P. & L. Co.* 77 Md. 85; *Owen v. Homan*, 3 Macn. & G. 378, 20 L. J. N. S. Ch. 314, 15 Jur. 339, Affirmed in 4 H. L. Rep. 997; *Norris v. Lake*, 89 Va. 513; *Grantham v. Lucas*, 15 W. Va. 425; *Crane v. McCoy*, 1 Bond. 422; *Voss v. Reed*, 1 Woods, 647; *Pullan v. Cincinnati & C. A. L. R. Co.* 4 Biss. 35; *Ben- neson v. Bill*, 62 Ill. 408; *Nichols v. Perry Patent Arms Co.* 11 N. J. Eq. 126; *Ex parte Walker*, 25 Ala. 81, 104; *Lenox v. Notrebe*, Hemp. 225; *Morrison v. Buckner*, Hemp. 442; *Simmons Hardware Co. v. Waibel*, 1 S. D. 488, 11 L. R. A. 267; *Mays v. Rose*, Freem. Ch. (Miss.) 703; *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 88; *Whelpley v. Erie R. Co.* 6 Blatchf. 271; *Milwaukee & M. R. Co. v. Soutter*, 94 U. S. 2 Wall. 510, 17 L. ed. 900; *Reid v. Reid*, 88 Ga. 24; *Verplank*

mere will or caprice of the chancellor who is called upon to act, but is broader and more comprehensive. It means, in this connection, the judicial action of the chancellor, based upon a careful consideration of the facts and circumstances of the particular case, the rights and interests of the respective parties, and the general principles of equity jurisprudence applicable thereto. Some courts have gone to the extent of holding that the appointment of a receiver rested so largely in the determination of the appointing court that the action was not a matter of review in the upper courts except where there appeared to be an abuse of the discretion. Judicial discretion, in the restricted sense in which it is sometimes used, in its logical results, places the court in a position of responsibility which, in most cases, it will not willingly assume, and in some cases it should not be permitted to assume.¹

v. Caines, 1 Johns. Ch. 57; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Syracuse City Bank v. Tallman*, 81 Barb. 201; *Sales v. Lusk*, 60 Wis. 490; *Rider v. Bagley*, 84 N. Y. 461; *Lowell v. Doe*, 44 Minn. 144; *Myers v. Estell*, 48 Miss. 372, 404; *Cone v. Paute*, 12 Helsk. 506; *Jacobs v. Gibson*, 9 Neb. 880; *La Société Française D'epargenes v. 15th Judicial Dist. Ct.* 53 Cal. 495; *Ashurst v. Lehman*, 86 Ala. 370; *Pelzer v. Hughes*, 27 S. C. 408; *Micou v. Moses*, 72 Ala. 439; *Pennsylvania Co. v. Jacksonville, T. & K. W. R. Co.* 55 Fed. Rep. 181 [2 U. S. App. 606]; *Williamson v. New Albany & Co. R. Co.* 1 Biss. 198; *Tyson v. Wabash R. Co.* 8 Biss. 247; *Union Trust Co. v. St. Louis, I. M. & S. R. Co.* 4 Dill. 114; *Oakley v. Paterson Bank*, 2 N. J. Eq. 178; *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 27 Fed. Rep. 146; *Skip v. Harwood*, 3 Atk. 564; *Greville v. Fleming*, 2 Jones & L. 885 (Sugden's Dec.); *Smith v. Port Dover & L. H. R. Co.* 12 Ont. App. 288, 25 Am. & Eng. R. Cas. 639; *Hamburgh Mfg. Co. v. Edsall*, 8 N. J. Eq. 141; *Hanna v. Hanna*, 89 N. C. 68; *Williamson v. Washington*

City, V. M. & G. S. R. Co. 88 Gratt. 624; *Denike v. New York & R. Lime & C. Co.* 80 N. Y. 599.

¹Judicial discretion has been defined to be a discretion to be exercised in discerning the course prescribed by the law; never the arbitrary will of the judge. *Tripp v. Cook*, 26 Wend. 152; *Platt v. Munroe*, 84 Barb. 298. According to Coke, *discernere per legem, quid sit justum*; perceiving by or through (or according to) the law what would be just. Anderson's Dictionary, p. 363. Judicial discretion as contradistinguished from the private discretion of the judge is wholly different. Of the latter Lord Camden says: "The (private) discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worse it is every vice, folly, and passion to which human nature can be liable."

While the appointment of a receiver rests in the discretion of the court, yet it is such discretion as will be subject

(b) MUST BE REASONABLE POSSIBILITY OF PLAINTIFF'S RECOVERY.

It must appear affirmatively that there is a reasonable possibility that the plaintiff, asking for a receiver, will ultimately succeed in obtaining the general relief sought by his suit.¹ As ap-

to review by a higher court. *La Société Française D'épargnes v. 15th Judicial Dist. Ct.* 53 Cal. 495; *Milwaukee & M. R. Co. v. Soutter*, 69 U. S. 2 Wall. 510, 17 L. ed. 900; *Grantham v. Lucas*, 15 W. Va. 425; *Wilson v. Davis*, 1 Mont. 98; *Emmons v. Garnett*, 7 Mackey, 52. However, the appellate court will not interfere with such discretion where the evidence is conflicting, unless it is shown that the discretion is abused; *Naylor v. Sidener*, 106 Ind. 179; *Simmons Hardware Co. v. Waibel*, *supra*; *Graham v. Fuller Electrical Co.* 75 Ga. 878; *Reid v. Reid*, 38 Ga. 24; *Gunby v. Thompson*, 56 Ga. 316; *Crawford v. Spurling*, 56 Ga. 611; *Gardner v. Howell*, 60 Ga. 11; *Nimocks v. Cape Fear Shingle Co.* 110 N. C. 280; *Robinson v. Ross*, 40 Ga. 375; *Cohen v. Meyers*, 42 Ga. 46; *Emerio v. Alvarado*, 64 Cal. 529; *Schlect's Appeal*, 60 Pa. 172; *Denike v. New York & R. Lime & C. Co.* 80 N. Y. 599; *Meadow Valley Min. Co. v. Dodds*, 6 Nev. 262; *Eaton & H. R. Co. v. Varnum*, 10 Ohio St. 622; *Maysville & L. R. Co. v. Punnett*, 15 B. Mon. 47. In Alabama it is held that the appellate court will not review this discretion except in statutory cases. *Miller v. Lehman*, 87 Ala. 517. The discretion is to be governed by a view of the whole circumstances of the case. *Owen v. Homan*, 3 Macn. & G. 378, 412 (4 H. L. Cas. 1083); *Smith v. Port Dover & L. H. R. Co.* 25 Am. & Eng. R. Cas. 639; *Hamburg Mfg. Co. v. Edsall*, 8 N. J. Eq. 141; *Voss v. Reed*, 1 Woods, 647; *Perry v. Oriental Hotels Co.* L. R. 5 Ch. App. 420; *Cookes v. Cookes*, 2 DeG. J. & S. 526; *Williamson v. Wilson*, 1 Bland,

Ch. 418. In *Orphan Asylum Soc. v. McCartee*, Hopk. Ch. 435, the court say: "It is said that the appointing of a receiver rests in discretion. This proposition does not teach much. A receiver is proper if the fund is in danger, and this principle reconciles the cases found in the books. There is no case in which the court appoints a receiver merely because the measure can do no harm. * * * As this case now stands before the court the fund appears to be entirely safe in the hands of the trustee." *Blondheim v. Moore*, 11 Md. 365; *Smith v. Port Dover & L. H. R. Co.* 25 Am. & Eng. R. Cas. 639. In *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 83, the court say: "The appointment of a receiver is the exercise of a power in aid of a proceeding in equity and is the subject of sound discretion. The court must be convinced that it is needful and is the appropriate means of securing a proper end. Such an appointment is a strong measure and is not to be exercised doubtfully. * * * The plaintiff must show a clear right in such a case, or a prima facie, with such attending circumstances of danger or probable loss as will move the conscience of a chancellor to interfere." In *Simpson v. Ottawa & P. R. Co.* 1 Ont. Ch. Chamb. 126, the court say: "I agree that where the court cannot interpose usefully it should not interfere at all, and that it should interfere only so far as it can interfere usefully."

¹*Owen v. Homan*, 3 Macn. & G. 378, 412, Affirmed in 4 H. L. Cas. 997;

plied to the plaintiff in this class of cases it is what has been, not inaptly, termed a *locus standi* in court. If the evidence is con-

Bainbrigge v. Baddeley, 3 Macn. & G. 413. The Lord Chancellor in this case said: "This court ought not, in any case, to disturb the possession of a party who stands upon his legal title without a reasonable probability that the plaintiff will ultimately succeed. I consider, therefore, that one indispensable ground for the exercise of the jurisdiction is the reasonable probability shown to the court that the parties claiming to disturb the possession will ultimately establish a title to it." In *Owen v. Homan*, *supra*, the court said: "The granting a receiver is a matter of discretion to be governed by a view of the whole circumstances of the case; one most material of which circumstances is the probability of the plaintiff being ultimately entitled to a decree. In this case many of the important points arise upon the construction of the deeds, and not upon disputed facts; and I repeat that in my opinion that construction is attended with too much doubt and difficulty to entitle the plaintiff to a receiver." See also *Blondheim v. Moore*, 11 Md. 365; *Mays v. Rose*, Freem. Ch. (Miss.) 718; *Rheinstein v. Bizbey*, 92 N. C. 309; *Levenson v. Elson*, 88 N. C. 184; *Goodyear v. Betts*, 7 How. Pr. 187; *Flagler v. Blunt*, 32 N. J. Eq. 518; *Leavitt v. Yates*, 4 Edw. Ch. 162; *Beecher v. Bininger*, 7 Blatchf. 170; *Smith v. Wells*, 20 How. Pr. 158; *Steele v. Aspy*, 128 Ind. 367.

The rule is the same as in case of an injunction asked; the plaintiff must first establish a *locus standi* in court: *Davenport v. Davenport*, 7 Hare, 217; *Outcall v. Disborough*, 8 N. J. Eq. 214; *Hill v. Thompson*, 8 Meriv. 622; *Pillworth v. Hopton*, 6 Ves. Jr. 51; *Smith v. Collyer*, 8 Ves. Jr. 89; *Nor-*

way v. Rowe, 19 Ves. Jr. 144; *Ashurst v. Lehman*, 86 Ala. 370; *Pelzer v. Hughes*, 27 S. C. 408; *Lovett v. Slocomb*, 109 N. C. 110; *Weis v. Goetter*, 72 Ala. 259 (See Statute); *Norris v. Lake*, 89 Va. 518.

"The authority of the court to preserve the property the subject of litigation pending the action until final judgment and then apply it, as justice may require, is too manifest to admit of question, and such authority should be exercised when it appears that there is reasonable ground to believe that the plaintiff may recover, and the interference of the court is necessary to protect the property in question pending the controversy." *Craycroft v. Morehead*, 67 N. C. 422; *Morris v. Willard*, 84 N. C. 293; *Levenson v. Elson*, 88 N. C. 182. If the defendant demands affirmative relief he must show an apparently good title, either not controverted or not unequivocally denied. *Lovett v. Slocomb*, 109 N. C. 110; *McNair v. Pope*, 96 N. C. 502; *Bryan v. Moring*, 94 N. C. 694; *Oldham v. First Nat. Bank*, 84 N. C. 304; *Wilkinson v. Dobbie*, 12 Blatchf. 298.

As illustrating the caution the courts exercise in cases where there is a dispute between plaintiff and defendant as to title, see *Lenox v. Notrebe*, Hemp. 225; *Parkhurst v. Kinsman*, 3 Blatchf. 78; *Elliott v. Newman*, 92 N. C. 519; *Myers v. Estell*, 48 Miss. 401; *Pullan v. Cincinnati & C. A. L. R. Co.*, 4 Bliss. 35; *Crawford v. Ross*, 39 Ga. 44; *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.*, 57 Pa. 88; *Furlong v. Edwards*, 8 Md. 99; *Latham v. Chaffee*, 7 Fed. Rep. 525; *Beecher v. Bininger*, 7 Blatchf. 178.

ficting, or the legal questions involved are doubtful in the matter of their determination, the application will be refused, as in a foreclosure proceeding where the right to foreclose is doubtful, or in a proceeding involving the legal construction of deeds.

(c) **MUST BE A NECESSITY OF PRESERVING PROPERTY.**

The court must be satisfied that a receiver is necessary to preserve the property, and thus adequately to protect the rights of the parties interested therein.¹ If the plaintiff has an adequate remedy at law then a receiver will not be appointed.² This principle is but the application in receivership matters of a general principle in equity jurisprudence.

(d) **DEFENDANT MUST BE HEARD OR HAVE OPPORTUNITY.**

The court will not appoint a receiver until the defendant,

¹ *Clark v. Ridgely*, 1 Md. Ch. 70; *Orphan Asylum Soc. v. McCartee*, Hopk. Ch. 429; *Chase's Case*, 1 Bland, Ch. 213; *Blondheim v. Moore*, 11 Md. 365; *Walker v. House*, 4 Md. Ch. 39; *Bloodgood v. Clark*, 4 Paige, 574; *Lloyd v. Passingham*, 16 Ves. Jr. 59-70. Lord Eldon in this case said: "The court must not only be satisfied of the existence of fraud, but it must be morally sure that upon the hearing of the cause the party would upon the circumstances be turned out of possession, and not only that, but it must see some danger to the immediate rents and profits." The chancellor in *Clark v. Ridgely*, *supra*, said: "Indeed, it is believed the authority and duty of the court to appoint, or not appoint, a receiver depends upon the question whether the property is or is not in danger in the hands of the party who may at the time be in possession. . . . There is no case in which the court appoints a receiver merely because the measure can do no harm." The Chief Justice in *Blondheim v. Moore* laid down as a fourth rule that should govern the court in the appointment of a receiver the following: "That fraud or imminent

danger if the intermediate possession should not be taken by the court must be clearly proved."

"There should, however, be a concurrence upon two grounds—a reasonable probability of success on the part of complainant, and that the subject-matter in controversy is in danger." *Ashurst v. Lehman*, 86 Ala. 370; *Norris v. Lake*, 89 Va. 513; *Skinner v. Maxwell*, 66 N. C. 45; *Flagler v. Blunt*, 32 N. J. Eq. 518. Waste on the part of the party in possession is sufficient to justify the appointment. *Voss v. Reed*, 1 Woods, 647.

² *Wooden v. Wooden*, 8 N. J. Eq. 429; *Mullen v. Jennings*, 9 N. J. Eq. 192; *Speights v. Peters*, 9 Gill, 473; *Rice v. St. Paul & P. R. Co.* 24 Minn. 464; *Corey v. Long*, 48 How. Pr. 497; *Parmly v. Tenth Ward Bank*, 3 Edw. Ch. 395; *Winkler v. Winkler*, 40 Ill. 179; *Coughron v. Swift*, 18 Ill. 414; *Orphan Asylum Soc. v. McCartee*, Hopk. Ch. 429; *Webster v. Couch*, 6 Rand. 519; *Poege v. Bell*, 3 Rand. (Va.) 586; *Sherman v. Clark*, 4 Nev. 188; *Morrison v. Buckner*, Hemp. 442; *Sollory v. Leaver*, L. R. 9 Eq. 22.

or party in possession of the property, has been heard, or has had an opportunity to be heard in response to the application.¹ It is

¹ *Morits v. Miller*, 87 Ala. 331; *Thompson v. Tower Mfg. Co.* 87 Ala. 733; *Ashurst v. Lehman*, 86 Ala. 370; *Sims v. Adams*, 78 Ala. 395; *Crowder v. Moore*, 52 Ala. 220. See *Heard v. Murray*, 93 Ala. 127; *Werborn v. Kahn*, 93 Ala. 201; *State, Brittin, v. New Orleans*, 43 La. Ann. 829; *Whitney v. New York & A. R. Co.* 66 How. Pr. 436, 82 Hun. 164; *People v. Albany, & S. R. Co.* 38 How. Pr. 228; *Field v. Ripley*, 20 How. Pr. 26; *Lammon v. Giles*, 3 Wash. Terr. 117; *Grandin v. La Bar*, 2 N. D. 206; *Stockton v. Harmon*, 82 Fla. 312; *Fricker v. Peters*, 21 Fla. 254; *Moyers v. Coiner*, 22 Fla. 422; *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201, 280; *Wabash R. Co. v. Dykeman*, 133 Ind. 56; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438; *French v. Gifford*, 30 Iowa, 148; *Bisson v. Curry*, 35 Iowa, 72; *Hove v. Jones*, 57 Iowa, 130; *Haas v. Chicago Bldg. Soc.* 89 Ill. 498; *Railway Co. v. Jewett*, 37 Ohio St. 649; *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622; *Word v. Word*, 90 Ala. 81; *Cook v. Detroit & M. R. Co.* 45 Mich. 453; *Turnbull v. Prentiss Lumber Co.* 55 Mich. 387; *Haugan v. Nettland*, 51 Minn. 552; *Fredenheim v. Rohr*, 87 Va. 764; *Ettlinger v. Persian Rug & C. Co.* 66 Hun. 94; *Johnson v. Powers*, 21 Neb. 292 (See Code); *Fricker v. Peters*, 21 Fla. 254; *Lucas v. Harris*, L. R. 18 Q. B. Div. 127, 56 L. J. Q. B. N. S. 15, 55 L. T. 685; *Re Potts* [1898] 1 Q. B. 648, 22 L. J. Q. B. 392; *Vause v. Woods*, 46 Miss. 120; *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525; *People v. St. Clair Circuit Judge*, 81 Mich. 456; *Bostwick v. Isbell*, 41 Conn. 805; *Hungerford v. Oushing*, 8 Wis. 320; *Devoe v. Ithaca & O. R. Co.* 5 Paige, 521 (See Stat.); *Nusbaum v. Stein*, 12 Md. 315; *Voshell*

v. Hynson, 26 Md. 83; *Mays v. Rose*, 1 Freem. Ch. 703; *Tiddballs v. Sargeant*, 14 N. J. Eq. 449; *Whitehead v. Wooten*, 43 Miss. 523; *Meridian News & Pub. Co. v. Diem & W. Paper Co.* 70 Miss. 695; *Buckley v. Baldwin*, 69 Miss. 804; *Sandford v. Sinclair*, 8 Paige, 378; *Gibson v. Martin*, 8 Paige, 481; *McCarthy v. Peake*, 9 Abb. Pr. 164, 18 How. Pr. 138; *Sandford v. Sinclair*, 8 Edw. Ch. 393.

Where in an action to quiet title to real estate and enjoin the defendant from tilling the land in question, the plaintiff's equities are denied by answer, and are without support from evidence extrinsic to the complaint, a receiver should not be appointed, even after notice and hearing; much less should the defendant be dispossessed summarily by *ex parte* proceedings. The practice of appointing receivers *ex parte* is not tolerated by the courts except in cases of gravest emergency and to prevent irreparable injury. *Grandin v. La Bar*, 2 N. D. 206.

A court is not justified in appointing a receiver *ex parte* when the complaint does not show that the property or any part of the same is about to be wasted, misappropriated or removed beyond the jurisdiction of the court; and that delay in granting relief might entirely defeat the object of the suit. *Chicago & S. E. R. Co. v. Cason*, 133 Ind. 49.

See also *Blondheim v. Moore*, 11 Md. 365; *Triebert v. Burgess*, 11 Md. 452; *Caillard v. Caillard*, 25 Beav. 512; *Rogers v. Dougherty*, 20 Ga. 371; *Simmons v. Wood*, 45 How. Pr. 268; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438. One served with notice cannot complain that others have not been

a well established principle in equity jurisprudence that the court will not encourage *ex parte* proceedings, and a departure from this principle requires a state of facts showing the greatest emergency.

The exceptions to the above rule are: (1) Where the appointment of a receiver is prayed for as a measure of final relief.¹ In such case the bill of complaint or petition, with the service of the writ, are supposed to be notice.

served. *Rapp v. Reehling*, 123 Ind. 255.

As to the early chancery practice in New York in corporation proceedings involving a receivership, see *Devoe v. Ithaca & O. R. Co.* 5 Paige, 521.

The law requiring notice has a much greater force when applied to a receivership over a corporation where large and conflicting interests are often involved, and where the entire property, business and assets may be taken from the company and placed in the hands of a receiver, and result in the utter destruction of the property and dissolution of the company. Of the appointment of a receiver in such a case without notice, Mr. Justice Swayne, in *Verplanck v. Mercantile Ins. Co.* *supra*, says: "It is not a common law receivership to protect the fund pending litigation; but the receiver is a statutory assignee vested with nearly all the powers and authority of the assignee of an insolvent debtor. It would therefore be a violation of one of the fundamental principles of justice to appoint such a receiver without any restriction of his powers on an *ex parte* application, and thus to condemn and deprive a company of its chartered privileges unheard."

"A case of great urgency should be made to appear to justify such an appointment without notice, and, whenever an injunction or restraining

order is sufficient to protect the rights of the plaintiff no receiver should be appointed. The appointment of a manager of a line of railroad is an extraordinary exercise of power. Such appointment should be made only in extreme cases, clearly justifying such action." *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201.

Where an absent defendant has been advertised to appear within a certain time limited for defendant's appearance an order for appointment of a receiver before the expiration of the time limited is irregular, except under special circumstances. *Sandford v. Sinclair*, 8 Edw. Ch. 393. See also *Gibson v. Martin*, 8 Paige, 481; *Field v. Ripley*, 20 How. Pr. 26; *McCarthy v. Peake*, 9 Abb. Pr. 164.

¹ *Newell v. Schnull*, 73 Ind. 241. The process which brings the defendant into court is sufficient notice where the final relief prayed for is the receivership. This case was under a statute as follows: "That receivers shall not be appointed by any court, in any case, until the adverse party shall have appeared and answered in the action pending, or shall have had reasonable notice of the pendency of the action, and the application for such appointment." It has also been held that where the record is silent as to notice of application the court will presume the trial court gave proper notice. *Miller v. Shriner*, 86 Ind. 493.

(2). Where all parties are before the court consenting to the appointment, or at least before the court in person or by attorney.¹ In such case, of course, the object sought by the service of notice is accomplished by the presence of the parties.

(3.) Where the defendants, or parties in interest, have absconded, or are beyond the jurisdiction of the court, or cannot be found.² Of course under such circumstances it would be unreasonable to require notice, and the rule is not obligatory.

(4.) Where there is imminent danger of loss, or great damage, or irreparable injury or the gravest emergency.³ Sometimes it

¹ *Brodie v. Barry*, 3 Meriv. 695; *Duckworth v. Trafford*, 18 Ves. Jr. 288; *Newell v. Schnull*, 78 Ind. 241; *Fitzpatrick v. Hawkshaw*, 1 Hog. 82; *McLean v. Lafayette Bank*, 3 McLean, 503; *Haugan v. Netland*, 51 Minn. 552. In this case the court say: "The general rule is to proceed only after notice, but this rule is not inflexible so as to prevent the court from proceeding in cases where it is impracticable to give legal notice, as in the case of absconding or nonresident defendants, but subject to proper limitations the court may in such cases proceed without notice and leave the party to move to vacate the order if he chooses to come in and submit to the jurisdiction of the court."

² *Hendrix v. American Mortg. F. L. Co.* 95 Ala. 318; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438; *People v. Albany & S. R. Co.* 55 Barb. 344; *French v. Gifford*, 30 Iowa, 148; *Bisson v. Curry*, 35 Iowa, 72; *Howe v. Jones*, 57 Iowa, 130; *Cleveland, O. O. & I. R. Co. v. Jewett*, 87 Ohio St. 649; *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622; *Word v. Word*, 90 Ala. 81; *Moritz v. Miller*, 87 Ala. 381; *Whitehead v. Woolen*, 48 Miss. 523; *Vause v. Woods*, 46 Miss. 120; *Cook v. Detroit & M. R. Co.* 45 Mich. 453; *Turnbull v. Prentiss Lumber Co.* 55 Mich. 387;

Wabash R. Co. v. Dykeman, 133 Ind. 56; *Haugan v. Netland*, 51 Minn. 552; *Douling v. Hudson*, 14 Beav. 423; *Maguire v. Allen*, 1 Ball. & B. 75; *Nash v. Hughes*, 1 Hayes & J. 400; *Bennett v. Bayley*, 1 Hayes & J. 400; *Greene v. Kernan*, 1 Hayes & J. 401; *Gibbins v. Mainwaring*, 9 Sim. 77; *Tanfield v. Irvine*, 2 Russ. 149; *Quin v. Gunn*, 1 Hog. 75; *London & S. W. Bank v. Facey*, 19 W. R. 676. 24 L. T. N. S. 126; *People v. Norton*, 1 Paige, 17; see *Williams v. Jenkins*, 11 Ga. 595.

If the proceeding is against a corporation and the officers cannot be found so as to be served with notice, the court, in the exercise of its discretion, may appoint. *Dayton v. Borst*, 7 Bosw. 115, 31 N. Y. 435 (Affirmed on other grounds); *Maish v. Bird*, 59 Iowa, 307.

Quite frequently the statute prescribes the circumstances under which a receiver may be appointed without notice. *Jones v. Graves*, 20 Iowa, 596; *Hutton v. Lockridge*, 27 W. Va. 428; *Maynard v. Bailey*, 2 Nev. 323; *Blondheim v. Moore*, 11 Md. 365; *Crowder v. Moore*, 52 Ala. 220; *Fricker v. Peters*, 31 Fla. 254; *Whitehead v. Woolen*, 48 Miss. 523; *Rogers v. Dougherty*, 20 Ga. 271. See N. Y. Code Civ. Proc. § 714.

³ *Fredenheim v. Rohr*, 87 Va. 764; *Re Potts* [1893] 1 Q. B. 618; *Grandin*

seems imperative that this exception be enforced as when, by notice, the very purpose of a receiver may be rendered wholly nugatory; at other times, however, notice may be given, and a

v. LaBar, 2 N. D. 206; *People v. Norton*, 1 Paige, 17; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438; *Taylor v. Eckersley*, L. R. 2 Ch. Div. 302; *Re H. H. v. H. L. R.* 1 Ch. Div. 276, 45 L. J. Ch. 749; *Fricker v. Peters*, 21 Fla. 254; *Whitelaw v. Sandys*, 12 Ir. Eq. 398; *Wabash R. Co. v. Dykeman*, 133 Ind. 56; *Baker v. Backus*, 32 Ill. 79; *Chicago & S. E. R. Co. v. Cason*, 133 Ind. 49; *Moyers v. Coiner*, 22 Fla. 422; *Beecher v. Bininger*, 7 Blatchf. 170; *Montgomery v. Knox*, 20 Fla. 372; *West v. Chasten*, 12 Fla. 315; *Blackett v. Blackett*, 24 L. T. N. S. 276; *Ashurst v. Lehman*, 86 Ala. 370; *Moritz v. Miller*, 87 Ala. 331; *Mays v. Rose*, Freem. Ch. (Miss.) 708; *Sims v. Adams*, 78 Ala. 395; *Vose v. Reed*, 1 Woods, 647; *Goodyear v. Betts*, 7 How. Pr. 187; *Flagler v. Blunt*, 32 N. J. Eq. 518; *Orphan Asylum Soc. v. McCartee*, Hopk. Ch. 429; *Kean v. Colt*, 5 N. J. Eq. 365; *Leavitt v. Yates*, 4 Edw. Ch. 162; *Lenox v. Notrebe*, Hemp. 225; *Maynard v. Railey*, 2 Nev. 313; *Johns v. Johns*, 23 Ga. 31; *Cleveland, C. C. & I. R. Co. v. Jewett*, 37 Ohio St. 649; *Sandford v. Sinclair*, 8 Paige, 373; *Gibson v. Martin*, 8 Paige, 481; *McCarthy v. Peake*, 9 Abb. Pr. 164; *Field v. Ripley*, 20 How. Pr. 26; *Lucas v. Harris*, 56 L. J. Q. B. N. S. 15.

In *Wabash R. Co. v. Dykeman*, 133 Ind. 56, the Rev. Stat. 1881, § 1230, provided that the receivers should not be appointed either in term or vacation in any case until the adverse party should have appeared or should have had reasonable notice of the application for such appointment except upon sufficient cause shown by affidavit. The statute being silent as to what should constitute a sufficient

cause, the court held that the "sufficient cause" required by the statute to be shown must be, First, for the appointment of a receiver at all. Second, for not giving notice of the application to the adverse party. The statement in the verified complaint that there was an emergency for the immediate appointment of a receiver without notice was not a sufficient showing. This was a mere statement of opinion, the facts on which the opinion was founded should have been pleaded in order to enable the court to judge of its correctness. *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438-451; *French v. Gifford*, 30 Iowa, 148; *Moritz v. Miller*, 87 Ala. 331. The court adopts the language of Gluck & Becker on Receivers of Corporations which is as follows: "Courts of Equity are exceedingly unwilling to appoint a receiver on an *ex parte* application. It is now the settled practice not to appoint a receiver *ex parte* and thereby deprive the corporation of the possession of its property before it has had an opportunity to be heard in relation to its rights, except in those cases where it is out of the jurisdiction of the court or none of its officers can be found; or where, for some other reason, it becomes absolutely necessary for the court to interfere before there is time to give notice to the corporation to prevent the destruction or loss of property." The court also refers to the following cases as sustaining the proposition: *People v. Albany & S. R. Co.* 55 Barb. 344, 369; *Bisson v. Curry*, 35 Iowa, 72; *Howe v. Jones*, 57 Iowa, 130; *Cleveland, C. C. & I. R. Co. v. Jewett*, 37 Ohio St. 649; *Cook v. De-*

temporary injunction granted pending a hearing and in this way preserve the rights of all parties. Frequently statutory provisions are made for emergency matters of this character, and especially so in regard to injunctions.

Where no notice is required to be given to the adverse party of the application for a receiver, by reason of danger or otherwise, it is not sufficient to make the bare allegation in the bill or petition of danger, loss or emergency, but the facts on which the allegation is based must be stated so as to enable the court to judge of its correctness.¹ Besides the general allegation would be bad pleading, in that it would be at most a conclusion.

troit & M. R. Co. 45 Mich. 458; *Turnbull v. Prentiss Lumber Co.* 55 Mich. 887, and other cases.

In *Whitelaws v. Sandys*, *supra*, the court upon the application of the plaintiff appointed a receiver over the land of a minor defendant before his appearance or answer on affidavit that the rents could not be enforced from the undertenants of the minor, and that his interest was in danger of being evicted, the head landlord having served ejectment for nonpayment of the head rent.

In *People v. Norton*, *supra*, the court say: "As a general rule a receiver should not be appointed without notice to the opposite party; but that rule must be subject to exceptions in special cases where irreparable injury would be sustained by one or both parties by such delay. *Sandford v. Sinclair*, 8 Paige, 878; *Gibson v. Martin*, 8 Paige, 481.

"In *Maguire v. Allen*, 1 Ball & B. 75, a receiver was appointed on the application of the plaintiff where the defendant had absconded to prevent service of the subpoena to appear and answer the bill. In these cases the defendant who had traversed the finding of the jury, had left the state and was not expected to return for several months and had no resi-

dence or place of business where a subpoena could be served. His solicitor who was employed on the traverse, on being applied to refused to appear, or do anything in this case on the ground that he was not authorized; and it was necessary that the receiver should be appointed without delay to collect the rents of the tenants which might be lost by a delay of a few days. Under these circumstances, I think these are proper cases for the court, in the exercise of a sound discretion, to dispense with the formality of a notice and make *ex parte* orders for the appointment of receivers; saving to the defendant the right hereafter to apply for relief against the order if he can show any good reason on the merits for discharging the same."

¹*Verplanck v. Mercantile Ins. Co.* 2 Paige, 438; *French v. Gifford*, 30 Iowa, 148; *Lindsay v. American Mortg. Co.* 97 Ala. 411; *Wabash R. Co. v. Dykeman*, 138 Ind. 56; *Chicago & S. E. R. Co. v. Cason*, 138 Ind. 49; *Moritz v. Miller*, 87 Ala. 331 (See Code); *Williams v. Jenkins*, 11 Ga. 595; *Ashurst v. Lehman*, 86 Ala. 370; *Fricker v. Peters*, 21 Fla. 254.

In *Verplanck v. Mercantile Ins. Co.* *supra*, Chancellor Walworth says: "In every case where the court is asked to deprive the defendant of the possession

§ 6. Functions of the receiver.

The functions of a receiver relate to and embrace the due execution and performance of the duties and obligations resting upon him by virtue of his office, taking into consideration the attitude he sustains to the court making the appointment, the parties before the court, concerning whose rights the court is called upon to adjudicate, and the nature and character of the property placed in his possession, custody or control.

(a) SOURCE OF POWER; NATURE AND EXTENT.

He derives his power, primarily, from the court, and his official action, duties and responsibilities are measured by the scope of the order which, after his qualification, constitutes him receiver, and such supplementary orders and directions as he may subsequently receive in the due administration of the estate or matters in controversy. His discretionary powers are limited, as a rule, to those acts and transactions which are incident to the general scope of authority given to him. He is an officer of the court, and in this sense has been considered, truly and properly, the hand of the court, and as such he has been held bound to render to the court a strict account of his official action.¹ As courts of equity, and those exercising equitable jurisdiction, have extended their jurisdiction, along with the general growth of remedial jurisprudence, the functions of the receiver have been increased very materially as compared with receiverships in the earlier stages of English and American courts.² As we have already

of his property without a hearing or an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper should be set forth in the bill or petition on which such application is founded. The facts must be stated on which the opinion is founded to enable the courts to judge of the correctness."

An allegation on information and belief is insufficient. *Moritz v. Miller*, *supra*. Where the affidavits show that defendants are disposing of the property in which complainant's claim an

equal interest with them, collecting and appropriating the proceeds of sale and that they are insolvent, it will justify the appointment of a receiver without notice. *Sims v. Adams*, 78 Ala. 395.

See also *Darcin v. Wells*, 61 How. Pr. 259; *Oakley v. Paterson Bank*, 2 N. J. Eq. 173.

¹ Chancellor Bland, in *Williamson v. Wilson*, 1 Bland, Ch. 418; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438.

²"In the progress and growth of equity jurisdiction, it has become usual to clothe such officers with

seen,' both in England and this country, the law of receivership has been extended by statutory enactment to many subjects, not previously embraced in the ordinary chancery jurisdiction, and the powers, duties and relationship of the receiver have been likewise greatly increased, and in many cases, particularly with regard to insolvent corporations, he is vested with all the property and effects of the corporation, the power to sell and dispose of the same and distribute the proceeds to its creditors and stockholders. This class of receivers we have termed statutory receivers, as distinguished from common law receivers, the functions of which are *sui generis*.

(b) TRUSTEE FOR ALL PARTIES; RESPONSIBILITY.

The receiver, occupying a position of perfect independence, so far as the parties are concerned, appointed by the court by reason of such relation, and reflecting as he does the impartiality of the court as between conflicting interests, is not the agent or special representative of the contestants or either of them. Neither the law nor the court will permit him in his administration to manifest the slightest inclination towards one party or the other. He is a trustee of the strictest character, conserving the interests of all parties with special favors for none,² and the property and

much larger powers than were formerly conferred." Mr. Justice Swayne in *Davis v. Gray*, 83 U. S. 16 Wall. 208, 219, 21 L. ed. 447, 452.

¹ *Ante*, § 8; see also *post*, chapter on Railways.

² *Detroit First Nat. Bank v. Barnum Wire & Iron Works*, 60 Mich. 487; *Davis v. Duke of Marlborough*, 2 Swanst. 108; *Brown v. Warner*, 78 Tex. 548, 11 L. R. A. 394; *Com. v. Franklin Ins. Co.* 115 Mass. 278; *Day v. Postal Teleg. Co.* 66 Md. 354; *Green v. Bostwick*, 1 Sandf. Ch. 185; *Devendorf v. Dickinson*, 21 How. Pr. 275; *Portman v. Mill*, 8 L. J. Ch. N. S. 161; *Ourlis v. Leavitt*, 1 Abb. Pr. 274; *Brown v. Northrup*, 15 Abb. Pr. N. S. 338; *Corey v. Long*, 43 How. Pr. 497.

There appears to be a limitation to the rule announced in the text when

applied to the dissolution of corporations, where by the act of dissolution the corporation in effect makes an assignment for the benefit of its creditors, in which case the receiver takes only the rights of the corporation such as could be asserted in its own name, and therefore in such case is the representative of the corporate body itself and not of its creditors or shareholders. *Republic L. Ins. Co. v. Swigert*, 185 Ill. 150, 12 L. R. A. 328.

The receiver does not in any special sense represent the party upon whose motion he is appointed, more than any other party to the cause. He owes an equal duty to all, and is responsible to the court alone. *Baker v. Backus*, 32 Ill. 79; *Beverley v. Brooks*, 4 Gratt. 208; *First Nat. Bank v. Bar-*

funds confided to his care are *in custodia legis*, and these it is his duty to guard and preserve with scrupulous care.¹ This position of trust and independence he continues to occupy until the litigation is brought to an end, and it is judicially ascertained to whom the property or its possession rightfully belongs, after which he becomes the representative of such successful party;² or where the property is sold for the benefit of creditors, he is the hand of the court and the agent of the creditors in the distribution of the proceeds. He is in no sense, however, the representative of those who are not parties to the suit, or become such during its progress.³ Neither is he, without the direction of the court, to interfere with or meddle in the litigation of the parties.

num Wire & Iron Works, 60 Mich. 487; *Union Nat. Bank v. Bank of Kansas City*, 186 U. S. 228, 84 L. ed. 341; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Know v. Winslow*, 54 Iowa, 200.

He is not to be controlled by the representatives of any party to the suit. *Iddings v. Bruen*, 4 Sandf. Ch. 417.

His powers and duties are measured by the order of court making the appointment and the established rules and practice of such court. *Battle v. Davis*, 66 N. C. 252.

See also *Skinner v. Maxwell*, 66 N. C. 45, 68 N. C. 400; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *Green v. Dostwick*, 1 Sandf. Ch. 185; *Hunt v. Wolfe*, 2 Daly, 303; *Van Rensselaer v. Emery*, 9 How. Pr. 135; *Corey v. Long*, 43 How. Pr. 497; *Devendorf v. Dickinson*, 21 How. Pr. 275; *Kaiser v. Kellar*, 21 Iowa. 95; *Snow v. Winslow*, 54 Iowa, 200; *Hooper v. Winston*, 24 Ill. 353; *Ellicott v. Warford*, 4 Md. 80; *Williamson v. Wilson*, 1 Bland, Ch. 418; *Coburn v. Ames*, 57 Cal. 201.

Where property is placed in the hands of a receiver, upon a decree for the plaintiff, the receiver's duties, as such, are at an end, and he holds merely as trustee for the plaintiff, and

the goods can be levied on in his hands, for the plaintiff's debts. *Very v. Watkins*, 64 U. S. 23 How. 469, 16 L. ed. 522. And see *Lottimer v. Lord*, 4 E. D. Smith, 183; *Re Colvin's Estate*, 3 Md. Ch. 378; *Ellicott v. Warford*, 4 Md. 80; *King v. Cutts*, 24 Wis. 627; *Meier v. Kansas P. R. Co.* 5 Dill. 476.

¹ *Ashurst v. Lehman*, 86 Ala. 370; *Gayle v. Johnson*, 80 Ala. 388; *Skinner v. Maxwell*, 66 N. C. 45, 68 N. C. 400; *Battle v. Davis*, 66 N. C. 252; *Corey v. Long*, 43 How. Pr. 497; *Devendorf v. Dickinson*, 21 How. Pr. 275; *Hunt v. Wolfe*, 2 Daly, 303; *Coburn v. Ames*, 57 Cal. 201; *Hooper v. Winston*, 24 Ill. 353.

² See note 1^a above.

³ *Howell v. Ripley*, 10 Paige, 43. In a case where a creditor's bill is filed in behalf of the complainants therein, and not in behalf of other creditors, the receiver is not necessarily a trustee for the benefit of all creditors, but for the benefit of those creditors in whose behalf he is appointed. *Young v. Clapp*, 147 Ill. 176; *Russell v. Chicago Trust & Sav. Bank*, 139 Ill. 533, 17 L. R. A. 345; *Bostwick v. Menck*, 4 Daly, 68; *Manley v. Rassiga*, 18 Hun, 288.

(c) CARE AND CUSTODY OF THE PROPERTY.

The receiver, occupying the peculiarly responsible position that he does, both in his attitude to the court and the parties before the court, is required to exercise great care and circumspection over the funds or property entrusted to him, or whatever other interests that may come to him as receiver.¹ Except in a few exceptional cases, he is selected not only because of his ability, honesty and integrity, but because of his not being interested in any manner in the subject-matter of the litigation. Neither will he be permitted to become interested in the property in his charge as receiver during the progress of the litigation, nor use such property or funds for purposes of his own personal gain, and all interest and profits derived from the funds or property must be strictly accounted for.² However proper his intentions may be, he is liable for loss or waste growing out of the careless management of his trusts.

§ 7. Effects of appointment.

The primary and proximate effects that follow the appointment of a receiver are:

(a) PLACES PROPERTY *in custodia legis*.

The property, funds, or whatever may be the subject-matter of the litigation that come to the hands of the receiver are *in custodia legis*, and being so, will not be permitted to be interfered with, either by the parties to the suit, strangers to the suit, or other courts of co-ordinate jurisdiction. The underlying reasons for this rule are apparent and need not be elaborated in this connection. See "Receiver's Possession."

(b) RECEIVER NOT PERMITTED TO BE SUED.

Neither will the court permit its receiver to be sued or harassed by litigation without its express permission, to be granted only in exceptional cases for judicious and special reasons. The

¹ *Walker v. Morris*, 14 Ga. 323; *Henry v. Kaufman*, 24 Md. 1; *State v. Gibson*, 21 Ark. 140; *Devendorf v. Dickinson*, 21 How. Pr. 375; *Salway v. Salway*, 2 Russ. & M. 215; *Iddings v.*

Bruen, 4 Sandf. Ch. 417; *Reynolds v. Pettigjohn*, 79 Va. 327; *Kaiser v. Keller*, 21 Iowa, 95. See further Receiver's Liability.

² *Battle v. Fisher*, 36 Miss. 321.

court first obtaining jurisdiction and appointing a receiver retains that jurisdiction, as a rule, for all purposes, settling and adjusting, in the same suit, all conflicting interests of whatsoever nature between the parties that grow out of or relate to the subject matter in controversy.¹ It may, however, permit a jury to be called to pass upon disputed questions of fact, or may refer the matter to a common law court and jury for settlement and adjudication, but, in such case, the court retains the property or funds under its control.

(c) DETERMINES NO RIGHTS AND AFFECTS NO LIENS.

The custody of the receiver is that of the law, and in its nature is provisional and suspensive, leaving the rights of all parties concerned to be controlled by the ultimate judgment of the court. The appointment, in and of itself, determines the rights of no one, and does not disturb, or in any wise affect the legal or equitable standing of any party to the suit, or strangers thereto. And while the custody of the property, or fund, may be transferred, all liens upon or rights therein remain unchanged, and, if the property be sold prior to the final determination of the respective rights therein the status of the parties to the proceeds is preserved and protected.² This is accomplished by suit-

¹ "By the order of appointment the court takes the whole subject into its own hands; and ultimately disposes of all questions, whether legal or equitable, growing out of the proceeding." *Beverly v. Brooks*, 4 Gratt. 187. That the court will not permit the possession of its receiver to be interfered with without its permission, see *Vermont & C. R. Co. v. Vermont O. R. Co.* 46 Vt. 792; *Russell v. East Anglian R. Co.* 8 Macn. & G. 104; *Ex parte Cochrane*, L. R. 20 Eq. 282; *Spinning v. Ohio L. Ins. & T. Co.* 2 Disney, 368; *Fort Wayne, M. & C. R. Co. v. Mellett*, 92 Ind. 585; *Skinner v. Maxwell*, 68 N. C. 400; *Potter v. Spa Springs Brick Co.* 47 N. J. Eq. 442; *Jacobson v. Landolt*, 78 Wis. 142; *Riggs v. Whitney*, 15 Abb. Pr. 388; *Brien v. Paul*, 3 Tenn. Ch. 357; *Woerishoffer*

v. North River Const. Co. 99 N. Y. 398; *Re Day*, 34 Wis. 638; *Marshall v. Lockett*, 76 Ga. 289; *Re Christian Jensen Co.* 128 N. Y. 550; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689; *Edwards v. Norton*, 55 Tex. 405; *Ellis v. Vernon Ice L. & W. Co.* 86 Tex. 109; *Russell v. Texas & P. R. Co.* 68 Tex. 646; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Thompson v. McCleary*, 159 Pa. 189.

And see further "Suits against Receiver."

² *Miller v. Bowles*, 58 N. Y. 258; *Myers v. Estell*, 48 Miss. 372; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 30 Fed. Rep. 344; *Union Nat. Bank v. Kansas City Bank*, 136 U. S. 228, 34 L. ed. 341; *Skip v. Harwood*, 8 Atk. 564; *Anon.* 3 Atk. 15; *Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322; *Ellis v. Boston, H. & E. R. Co.* 107 Mass.

able and proper provisions in the decree or judgment. All liens are protected and preserved, but the right to enforce such liens is suspended pending the receivership.

§ 8. Kinds of receivers.

Receivers are sometimes designated as General Receivers, Receivers *Pendente Lite*, Special Receivers, Interim Receivers, Managers, Ancillary Receivers, and in England, Liquidators. The purposes in all cases being the same, though the methods of accomplishment may differ, and though the functions of the receiver may vary in different cases, no good result, but confusion rather, follows the application of the several names to the receiver, and so far as the general treatment of the subject is concerned, no nominal distinction will be observed. Receivers may be general as to property and special as to power, or *vice versa*. Nearly all receivers are *pendente lite*, and with equal propriety might be called *interim*, while a manager is only in the exercise of an enlarged power, for the accomplishment of the same end.¹

1; *Maynard v. Bond*, 67 Mo. 815; *Herman v. Fisher*, 11 Mo. App. 275; *Ex parte Dunn*, 8 S. C. 207; *Beverley v. Brooks*, 4 Gratt. 187; *Bitting v. Ten Eyck*, 85 Ind. 357; *Leavitt v. Yates*, 4 Edw. Ch. 138; *Ellicott v. Warford*, 4 Md. 80.

That the receiver's possession is the possession of the court, see *Skinner v. Maxwell*, 68 N. O. 400; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Day v. Postal Teleg. Co.* 66 Md. 354; *De Visser v. Blackstone*, 6 Blatchf. 235; *Re Buler's Estate*, 18 Ir. Ch. N. S. 456; *Re Merchants' Ins. Co.* 3 Biss. 165; *Mays v. Rose*, Freem. Ch. (Miss.) 708; *Angel v. Smith*, 9 Ves. Jr. 335.

That he takes the property subject to all liens thereon, see *Bowling Green Sav. Bank v. Todd*, 64 Barb. 146; *Rich v. Loutrel*, 18 How. Pr. 121; *Gere v. Dibble*, 17 How. Pr. 81; *Re North American Gutta Percha Co.* 17 How. Pr. 549; *Smith v. New York Consol. Stage Co.* 18 Abb. Pr. 419, 432; *Conley*

v. Deere, 11 Lea, 274; *Von Roun v. Super. Ct.* 58 Cal. 358; *Union Trust Co. v. Weber*, 96 Ill. 346; *Lorch v. Aultman*, 75 Ind. 162. And while the liens are not suspended or in any manner interfered with, yet the right to enforce such liens by ordinary process is suspended. *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 109. And see also *Walling v. Miller*, 108 N. Y. 178; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Thompson v. McCleary*, 159 Pa. 189; *Dugger v. Collins*, 69 Ala. 324. See further Chap. II, § 17.

¹ As we have seen, a liquidator is a statutory receiver, with enlarged powers conferred by Act of Parliament. See *ante*, § 3. And may be appointed generally or for a special purpose. *Re Langham Skating Rink Co.* L. R. 6 Ch. Div. 102.

A receiver *pendente lite* is a mere temporary officer and does not possess the power of a permanent receiver, or any legal power except such as is specifically conferred upon him by the

§ 9. At what stage appointed.

(a) It is a prerequisite that there shall be at the time of making application a suit actually pending.¹

(b) And there must be a strong special ground to induce the courts to appoint a receiver before answer.²

(c) After decree and sale a receiver may be appointed if it is necessary to secure complete justice to the parties.³

court. His functions are limited to the care and preservation of the property.

Decker v. Gardner, 124 N. Y. 384, 11 L. R. A. 480; *Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 372; *Keeney v. Home Ins. Co.* 71 N. Y. 396.

In cases of danger or loss the court may appoint an interim receiver until such time as a receiver may be appointed in due course of law. *Taylor v. Eckersley*, L. R. 2 Ch. Div. 302, 45 L. J. Ch. 527; 34 L. T. 637.

A manager appears to be a person appointed to carry on a business *pendente lite*. *Smith v. New York Consol. Stage Co.* 18 Abb. Pr. 419, 433. The purpose is to enable the company's business to be sold as a going concern, the current expenses, wages, etc., being provided for by the plaintiff. *Makins v. Ibotson* [1891] 1 Ch. 133, 60 L. J. Ch. 164, 63 L. T. 515; *Peek v. Trinsmaran Iron Co.* L. R. 2 Ch. Div. 115. And it seems that such a manager will be appointed where it is necessary to preserve the security though the business is not mortgaged. *Campbell v. Lloyd's Bank*, 58 L. J. Ch. 424.

¹ The appointment of a receiver prior to filing a bill is a nullity.

Jones v. Schall, 45 Mich. 379; *MERCHANTS & M. Nat. Bank v. Kent*, 43 Mich. 292; *Guy v. Doak*, 47 Kan. 236; *Hardy v. McClellan*, 53 Miss. 507; *Jones v. Bank of Leadville*, 10 Colo. 464; *Kimball v. Goodburn*, 32 Mich. 10; *Baker v. Backus*, 32 Ill. 79; *Davis v. Flagstaff Silver M. Co.* 2 Utah, 92.

² *Baker v. Backus*, 32 Ill. 79; *Weis*

v. Goetter, 72 Ala. 259; *Hugonin v. Basely*, 13 Ves. Jr. 105; *Micou v. Moses*, 72 Ala. 439.

³ *Connelly v. Dickson*, 76 Ind. 440. In this case the court say: "The debtor who remains in possession after the sale of his land certainly owes some duties to the purchaser. He has charge of the property and without doubt may be restrained from committing actual waste; but mere permissive waste may be no less harmful. Sometimes, too, injunction does not afford adequate relief against waste. . . . Under our statute the judgment debtor or owner in possession holds the land itself conditionally for the purchaser, that is to say, as trustee for him; and for the reasonable rents and profits is conditionally accountable or liable to him. . . . Our decision is that where it is shown that the property is in the hands of a tenant who is under contract to pay a stipulated rent which has not been paid to the judgment debtor or to the owner of the land and that the latter is insolvent and cannot redeem, the court may appoint a receiver to collect such rents and to hold the same until the end of the year, if a redemption is not sooner made, to be paid over to the debtor if he redeems and otherwise to the purchaser."

And after decree a receiver may be appointed though not prayed for in the bill.

Shannon v. Hanks, 88 Va. 338.

(d) Or after appeal where the bond affords no adequate protection.¹

§ 10. Application for ; allegations ; who appointed.

(a) BY WHOM APPLICATION MADE.

As a general rule and in the ordinary course of practice the appointment of a receiver is made on the application of the plaintiff in the suit. To this rule, however, there may be exceptions, as where the application is made by both plaintiff and defendant, but the conduct of the proceedings, in general, will be given to the plaintiff.² And while it may not be entirely regular for one defendant to apply for a receiver as against a co-defendant,³ yet on a cross-bill he may do so,⁴ but even that has been held not to be necessary.⁵

(b) EXERCISE OF CARE BY THE COURTS.

In passing upon the application, by whomsoever made, the court will carefully scrutinize the application and the effects of the appointment upon all parties concerned.⁶ The appointment is usually an incident only to the main purpose of the bill or petition, and is, in effect, the sequestration of the defendant's property in advance of a hearing and adjudication of the rights of

¹ *Beard v. Arbuckle*, 19 W. Va. 145; *Adkins v. Edwards*, 88 Va. 316, *Moran v. Johnston*, 26 Gratt. 108.

² *Sargant v. Read*, L. R. 1 Ch. Div. 600, 45 L. J. Ch. 206.

³ *Robinson v. Hadley*, 11 Beav. 614; 18 L. J. N. S. Ch. 428. But see *Sargant v. Read*, L. R. 1 Ch. Div. 600.

⁴ *Grote v. Bury*, 1 W. R. 92.

⁵ *Sargant v. Read*, *supra*; *Henshaw v. Wells*, 9 Humph. 568; *Horton v. White*, 84 N. C. 297; *Pittman v. Townshend*, 1 W. W. & A. B. (Victoria), 140.

⁶ In granting the order of appointment of a receiver the court will scrutinize not only the rights of the moving party, but the injuries that may be suffered by the adverse party and the public at large. This is particularly the case where a line of railroad forming part of a system operated as a

unit is thereby detached from the main road. In such case not only the parties to the suit are affected, but a large number of employes are disturbed in their relations with their employer, and the general public, along the line of road, are liable to be greatly inconvenienced by the disturbance to their shipping facilities. *Wabash R. Co. v. Dykeman*, 133 Ind. 56. Courts in some cases have been made the instruments of perpetrating great wrongs, not only upon the public, but those having large pecuniary interests in corporations where the real purposes of the plaintiff in making the application have been cleverly concealed at the time of the appointment, and only discovered when the effects were disastrous and beyond remedy.

the parties, and the right of the plaintiff to recover upon the main features of the bill or petition must be clearly established. Thus in a foreclosure proceeding the right to foreclose must be apparent before the right to a receiver will be acted upon. It would seem, however, that in case of waste or imminent danger of loss the court will act with greater freedom. In its effect the appointment is not unlike the statutory attachment, so far as the seizure and preservation of the property is concerned, and the ultimate right of the successful party is carried back to the date of the order.

(c) ALLEGATIONS, AVERMENTS.

By whomsoever the application is made it is necessary that the proper averments shall be clear and distinct,¹ but the sufficiency of the averments of the bill may be supplemented by affidavits or oral testimony.² The court, as a rule, will decline to appoint a receiver on an interlocutory application in the absence of a prayer asking for such relief,³ but this rule is not an unbending rule where the facts appearing clearly justify the appointment.⁴ In all cases the application must be made in a reasonable time,⁵ unless the allegations contained in the bill are supplemented by affidavits showing an excuse for the delay or circumstances justifying the intervention of the court.⁶

(d) RECEIVER MUST BE DISINTERESTED.

Inasmuch as the receiver must be an indifferent person as between all parties, and holds the property for the benefit of all, it

¹Allegations that the plaintiff has reason to believe that the property involved in the litigation will be wasted if a receiver be not appointed are not sufficient. *Hanna v. Hanna*, 89 N. C. 68; *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622; *Supreme Sitting Order of I. H. v. Baker*, 134 Ind. 293, 20 L. R. A. 210; *Naylor v. Sidener*, 106 Ind. 179; *Steele v. Aspy*, 128 Ind. 367. Amendments to the petition in furtherance of justice may be made, however, if an opportunity be given to answer the same, there being no abuse of the judicial discretion. *McCord v. Weil*, 29 Neb. 682; but see *Gouthwaite v. Rippon*, 1 Bea v. 54; *Smith v. Dixon*, 4 W. R. 259.

²*Naylor v. Sidener*, 106 Ind. 179.

³*Pare v. Clegg*, 7 Jur. N. S. 1136.

⁴*Malcolm v. Montgomery*, 2 Moll. 500; *Osborne v. Harvey*, 1 Younge & C. 42; *Bowman v. Bell*, 14 L. J. N. S. Oh. 119. But it is not necessary to pray for a receiver in a supplemental bill where the original bill contains such a prayer. *Hall v. Kirby*, Exch. 11 (June, 1831, unreported.)

⁵*Hood v. First Nat. Bank*, 29 Fed. Rep. 55.

⁶*Loveday v. D'Esterre*, 1 Hayes & J. 151; *Spratt v. Ahearns*, 1 Hayes & J. 800; *Hood v. First Nat. Bank*, 29 Fed. Rep. 55.

is not proper that he should be interested in the property, which is the subject-matter of the litigation, nor be interested in the result of the litigation.¹ There are cases, however, where the receiver may be a party and interested in the result of the litigation, but in such cases he is usually selected by agreement and acts without compensation. The court being free from all bias, and meting out justice fairly and impartially to all parties concerned, it is equally imperative that its officers shall be equally free and independent and capable of acting without the slightest cause for suspicion of personal interest. It is not only necessary that the receiver shall not be an interested party in the litigation but the court will not knowingly permit its receiver to occupy a position where adverse criticism may be made in reference to his acts. Cases sometimes occur, however, where, owing to the peculiar nature of the business, it is difficult to procure a competent and proper person to act who is wholly disinterested in the business, and in such case the general rule is applied with less stringency.

(e) SUBSEQUENT RECEIVERS; ANCILLARY.

While the general rule is that but one receiver will be appointed,² yet subsequent receivers for the same fund may be appointed for special purposes, subject however to the powers of the receiver previously appointed,³ but their necessity must be clearly shown.⁴

Ancillary receivers are sometimes appointed to protect prop-

¹*Detroit First Nat. Bank v. Barnum Wire & I. Works*, 60 Mich. 487. He should not be a party to the suit unless his appointment is consented to. *Ben- nerson v. Bill*, 62 Ill. 408; nor is a mas- ter in chancery proper whose duty it is to pass upon the accounts of the re- ceiver. *Id.* See further Chap. II. § 21.

²*Wabash, St. L. & P. R. Co. v. Central Trust Co.* 22 Fed. Rep. 272; *Biddulph v. Hickman*, 1 Hog. 244; *Downshire v. Tyrrell*, Hayes, 354; *Kelly v. Rutledge*, 8 Ir. Eq. 228.

The fact that a receiver of the es- tate of a debtor has been already ap-

pointed, is no answer to an applica- tion for a similar appointment in a subsequent suit by other parties; but the same receiver will be appointed in the subsequent suit.

Rogers v. DeForest, 7 Paige, 272.

³*Bailey v. Belmont*, 10 Abb. Pr. N. S. 270; *British Linen Co. v. South Am- erica & M. Co.* [1894] 1 Ch. 108; *Bailey v. O'Mahoney*, 1 Jones & S. 239.

⁴*Wabash, St. L. & P. R. Co. v. Central Trust Co.* 22 Fed. Rep. 372. But see *Phinney v. Augusta & K. R. Co.* 56 Fed. Rep. 278.

erty beyond the jurisdiction of the first receiver.¹ The ancillary receiver is not necessarily the same person as the receiver in the original proceeding, yet if consistent with interests of all parties the management of the estate will be more efficiently managed by so doing. The tendency of courts is to recognize the rights of a foreign receiver under a species of comity and thus, to some extent, avoid the necessity of ancillary receivers.

¹*Platt v. Philadelphia & R. R. Co.* 54 Fed. Rep. 569; *Mercantile Trust Co. v. Kanawha & O. R. Co.* 39 Fed. Rep. 337. Such receiver's appointment should be without prejudice.

In *Platt v. Phila. & R. R. Co.* 54 Fed. Rep. 569, it was held that the Circuit Court would follow the general practice in the Federal courts in granting an ancillary receivership on ex parte application, but without prejudice to the full consideration of the legality of the practice on subsequent motion to dissolve the order.

In *Clyde v. Richmond & D. R. Co.* 53 Fed. Rep. 539, ancillary receivers were appointed in South Carolina, the original proceeding being in Virginia and it was held that the latter court was the proper forum in which a petition should be filed by a creditor asking for relief. The petition however was retained in South Carolina on the ground of the

claim being a meritorious one, in order to assist the petitioner in enforcing the payment of his claim.

In *Ames v. Union P. R. Co.* 60 Fed. Rep. 966, it was held that the receivers of a railroad system, appointed in several circuits, should report to and be governed by the Circuit Court sitting in the district of their original appointment in all matters relating to their general management of the trust, their general accounting, and the general operation of the road within the circuit. But the Circuit Court, sitting in other districts with the same receivers, were subsequently appointed, had jurisdiction to determine the validity and amount of claims of citizens thereof against the receivers and the corporation; and citizens of one district will not be required to go into another district to assert their claims.

CHAPTER II.

MATTERS RELATING TO THE APPOINTMENT.

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| § 28. Bond. | (d) Suit on bond. |
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§ 11. Scope of the bill or petition.

In order to authorize the appointment of a receiver the bill or petition must lay a foundation for it by stating the facts which show its necessity or propriety.¹ And owing to the nature of the remedy and the results that usually follow the appointment, a strong case must be made in order to justify the court in exercising its jurisdiction, and it must appear that there is no other safe or expedient remedy.² The primary purpose in all cases is protecting and securing the property which is the subject-matter of the litigation.³ If the plaintiff has an adequate remedy at law,⁴

¹*Tomlinson v. Ward*, 2 Conn. 396. In this case the court say: "Courts of equity have undoubtedly a power to appoint receivers in proper cases. But the facts should be stated in the bill which show the necessity or propriety of the appointment; so that the other party may answer them." The allegations must not be based on mere belief. *Cofor v. Echerson*, 6 Iowa, 502; *Heavilon v. Farmers' Bank*, 81 Ind. 249.

It is not an abuse of discretion for the court on motion for the appointment of a receiver *pendente lite*, to refuse to hear affidavits presented after the expiration of ample time limited by such court in which such affidavits might have been presented. *Farmers' Nat. Bank v. Backus* (Minn.) 66 N. W. 5.

The appointment of a receiver in a regular proceeding for that purpose upon a hearing cannot form the basis of an action for damages against the applicants. *Saunders v. Kempner* (Tex. Civ. App.) 32 S. W. 585.

A receiver *pendente lite* is properly appointed in an action to recover money improperly appropriated by

defendant, although he is shown to have considerable property, where he has property interests in another state, and has been trying to dispose of his property in the state where the action is brought. *Bird v. Lanphear*, 92 Hun, 567, 36 N. Y. Supp. 1069.

²*Speights v. Peters*, 9 Gill, 472. "It is a high power never exercised where it is likely to produce irreparable injustice or injury to private rights or where there exists any other safe or expedient remedy." *Winkler v. Winkler*, 40 Ill. 179; *Coughron v. Swift*, 18 Ill. 414; *Webster v. Couch*, 6 Rand. (Va.) 519; *Poage v. Bell*, 3 Rand. (Va.) 586; *Wooden v. Wooden*, 3 N. J. Eq. 429; *Morrison v. Buckner*, Hemp. 442; *Corey v. Long*, 43 How. Pr. 497; *Rice v. St. Paul & P. R. Co.* 24 Minn. 464; *Sherman v. Clark*, 4 Nev. 138; *Parmley v. Tenth Ward Bank*, 3 Edw. Ch. 295; *Brown v. Chase*, Walk. Ch. 43; *Spooner v. Bay St Louis Syndicate*, 44 Minn. 403; *Sollory v. Leaver*, L. R. 9 Eq. 22; *Knighton v. Young*, 22 Md. 359.

³*Battle v. Davis*, 66 N. C. 252.

⁴*Sollory v. Leaver*, L. R. 9 Eq. 22; *Drewry v. Barnes*, 3 Russ. 106; *Par-*

or if it does not appear that the appointment is demanded in order to afford adequate protection to the parties the court will not act. The action of the court based upon the ground that no one will be seriously injured thereby is an unjustifiable exercise of jurisdiction by a court of equity.

§ 12. Time when appointed.

(a) Under the early English practice it was not considered proper to appoint a receiver prior to the answer of the defendant.¹ This rule, however, has been abrogated by the modern English practice (1) where the defendant has in answer to plaintiff's application filed an affidavit which, so far as the application is concerned, is to be treated as an answer, (2) and where fraud is clearly proved by affidavit, or where imminent danger would ensue unless the property is taken under the care of the court.² The appointment is usually made on an interlocutory application.³

(b) The modern English practice in regard to the appointment, before answer, has been adopted in this country where the plain-

ker v. Moore, 3 Edw. Ch. 284; *Spooner v. Bay St. Louis Syndicate*, 44 Minn. 408; *Rice v. St. Paul & P. R. Co.* 24 Minn. 464.

¹ *Yann v. Barnett*, 2 Bro. C. C. 158.

² *Duckworth v. Trafford*, 18 Ves. Jr. 283; *Lloyd v. Passingham*, 16 Ves. Jr. 70; *Hugonin v. Basely*, 18 Ves. Jr. 105; *Anon.* 12 Ves. Jr. 4; *Jervis v. White*, 6 Ves. Jr. 788, *note*. The Lord Chancellor in *Owen v. Homan*, 4 H. L. Cas. 997, said: "In all cases, therefore, where the court interferes by appointing a receiver of property in the possession of the defendant before the title of the defendant is established by decree it exercises a discretion to be governed by all the circumstances of the case." But it seems that a court will not appoint a receiver before a hearing, where the purpose is to carry into effect a foreign decree. *Houlditch v. Donegall*, Beatty (Jr.) 390.

³ *Tripp v. Chard R. Co.* 17 Jur. 887, 22 L. J. Ch. 1084; *Peck v. Trimsaran*

Coal, Iron & S. Co. 45 L. J. Ch. 281; *Porter v. Lopes*, L. R. 7 Ch. Div. 358, 37 L. J. N. S. 824; *Anderson v. Guichard*, 9 Hare, 275. And the appointment may be before service in case of bankruptcy and consequent loss of the estate. *Re H.'s Estate*, H. v. H. L. R. 1 Ch. Div. 276, 45 L. J. Ch. 749: The court will not appoint without notice to defendant, before the time for his appearance has expired, unless he has withdrawn himself from the jurisdiction, or the property is in danger of being lost, or some other special circumstance exists making an immediate appointment necessary. *Sandford v. Sinclair*, 8 Paige, 378; *Gibson v. Martin*, 8 Paige, 481; *McCarthy v. Peake*, 9 Abb. Pr. 164, 18 How. Pr. 138.

The court will not appoint on an *ex parte* application before the appearance, or until defendant has made default after service of process, except in cases of emergency. *Field v. Ripley*, 20 How. Pr. 26.

tiff satisfies the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve such property from loss or serious damage.' But as we have seen, except in rare instances notice should be given of the intended application.*

(c) After decree and upon motion a receiver may be appointed where the case is urgent,¹ and even where no receiver is prayed

¹*Bloodgood v. Clark*, 4 Paige, 574; *Johns v. Johns*, 23 Ga. 81; *Jones v. Dougherty*, 10 Ga. 278; *Bank of Monroe v. Schermerhorn*, 1 Clarke, Ch. 214. Where an absent defendant has been advertised to appear within a certain time, an order for the appointment of a receiver, obtained by the plaintiff *ex parte*, before the expiration of the time limited for defendant's appearance, is irregular, except under special circumstances. *Sandfor v. Sinclair*, 3 Edw. 393. If, however, on filing an answer the bill and answer taken together show that a receiver ought not to have been appointed, a motion to discharge by defendant is proper. *Phoenix Mut. L. Ins. Co. v. Grant*, 3 Mc. Arth. 220; *Allen v. Dallas & W. R. Co.* 3 Woods, 332.

It is not necessary to show that there is property to come into the hands of a receiver as a prerequisite to the appointment. *Dutton v. Thomas*, 97 Mich. 93; *Rankin v. Rothchild*, 78 Mich. 10.

In *Clark v. Ridgely*, 1 Md. Ch. 70, the court say: "A receiver should not be appointed before the coming in of the answer, and although the rule has been broken through, the ground which will induce the court to disregard it must be very strong and special." It must clearly appear that the property is in danger. *West v. Swan*, 3 Edw. Ch. 420. And where the motion to appoint is on bill and answer, and the answer denies the material

allegations of the bill the motion will be refused. *Simmons v. Henderson*, 1 Freem. Ch. (Miss.) 493.

A receiver cannot be appointed over a solvent corporation upon the bill of a minority stockholder before the time to answer has expired, because of abuse of authority by the president, or his refusal to account for moneys in his hands or to allow the complainant to inspect the books, where his acts are approved by the majority of the stockholders. *Ranger v. Champion Cotton Press Co.* 52 Fed. Rep. 609.

Where the bill of complaint is fully responded to by the answer and no further proof is offered by plaintiff there are no grounds for the appointment of a receiver. *Crombie v. Order of Solon*, 157 Pa. 588.

²See § 5, ¶ (d).

The appointment of a receiver in the trial court cannot be questioned in the appellate court if the appointment was by consent. *Little Rock Waterworks Co. v. Barrett*, 108 U. S. 576, 28 L. ed. 523.

³*Cooke v. Gwyn*, 3 Ark. 690; *Schreiber v. Carey*, 48 Wis. 208; *Re Bywater's Estate*, 1 Jur. N. S. 227; *Bowman v. Bell*, 14 Sim. 892; *Thomas v. Davies*, 11 Beav. 29; *Merrill v. Elam*, 2 Tenn. Ch. 513; *Hutton v. Lockridge*, 27 W. Va. 428; *Beard v. Arbuckle*, 19 W. Va. 145; *Aston v. Turner*, 11 Paige, 436; *Wright v. Vernon*, 3 Drew. 112; *Moran v. Johnston*, 26 Gratt. 108; *Connelly v. Dickson*, 76 Ind. 440; *Brinkman v. Ritzinger*, 82 Ind. 258; *Clyburn v. Ray-*

for.¹ The court will retain jurisdiction until complete justice is done between the parties.

(d) And after decree and an appeal from such decree a receiver may be appointed,² but only where the supersedeas, or appeal bond, does not cover the rents and profits.

§ 13. Must be suit pending.

It is a prerequisite to the appointment of a receiver that there

nolds, 31 S. C. 91; *Shannon v. Hanks*, 88 Va. 388; *Haas v. Chicago Bldg. Soc.* 89 Ill. 498; *Adkins v. Edwards*, 83 Va. 316.

In England after a judgment for foreclosure absolute a receiver will not be appointed. *Wills v. Luff*, L. R. 88 Ch. Div. 197, 57 L. J. Ch. 568.

When a mortgagor has a right of possession of mortgage premises until the expiration of the statutory period of redemption a receiver of the crops grown on the premises should not be appointed. *White v. Griggs*, 54 Iowa, 650; *Paine v. McElroy*, 78 Iowa, 81.

Upon the appointment of a receiver in a creditor's suit, the defendant is not entitled to the rents and profits of his real estate during the time allowed for a redemption from a sale on execution, but they go to the receiver immediately. *Farnham v. Campbell*, 10 Paige, 598.

¹*Wright v. Vernon*, 1 Drew, 68; *Connelly v. Dickson*, 76 Ind. 440; *Clyburn v. Reynolds*, 31 S. C. 91; *Shannon v. Hanks*, 88 Va. 388. But, where a receiver is asked for after decree there must be a strong case made out. *Adair v. Wright*, 16 Iowa, 885, and see *Haas v. Chicago Bldg. Soc.* 89 Ill. 498.

²*Adkin v. Edwards*, 83 Va. 316; *Beard v. Arbuckle*, 19 W. Va. 145; *Moran v. Johnston*, 26 Gratt. 108; *James River & K. Co. v. Littlejohn*, 18 Gratt. 63.

The court will appoint a receiver, *pendente lite*, upon a showing, after trial and before entry of decree, that the property is deteriorating in value and that large expense is being incurred in maintaining and repairing the property; and in such case will order a sale of the property, and after a confirmation of the sale require the receiver to pay the amount in his hands to the plaintiff. *Toby v. Oregon Pacific R. Co.* 98 Cal. 490.

A receiver may be appointed after the rendition of a decree where occurrences arise which threaten the effectiveness of such decree. *Chicago & S. E. R. Co. v. St. Clair* (Ind.) 42 N. E. 225.

The supreme court of the United States will not appoint a receiver in a case on appeal to that court, where no irregularities in the sale are shown, and the decree for sale was by consent, and the property is in the hands of the purchaser. *Pacific R. Co. v. Ketchum*, 95 U. S. 1, 24 L. ed. 347.

A receiver of specific real estate cannot be appointed pending an appeal from a judgment setting aside the probate of a will, under N. Y. Code Civ. Proc. § 713, authorizing the appointment of a receiver after final judgment to preserve, pending an appeal, the property which is the "subject" of the action. *Johnson v. Cochran*, 91 Hun, 163, 36 N. Y. Supp. 287.

shall be a suit pending in which the application is made; otherwise the order appointing will be void.¹

¹*Ex parte Whitfield*, 2 Atk. 315; *Anon.* 1 Atk. 489, 578; *Ex parte Peillon*, 2 Thomson (Nova Scotia) 405; *Young v. Wright*, 8 P. R. (New Brunswick) 198; *Harwell v. Potts*, 80 Ala. 70; *Crowder v. Moone*, 53 Ala. 220; *Guy v. Doak*, 47 Kan. 236; *Merchants & M. Nat. Bank v. Kent*, 43 Mich. 292. Nor, does the subsequent filing of a bill validate the appointment. *Harwell v. Potts*, ante; *Gold Hunter Min. & S. Co. v. Holleman*, 2 Idaho, 839; *Jones v. Schall*, 45 Mich. 379; *Hardy v. McClellan*, 53 Miss. 507.

Courts have no power to appoint a receiver except in a suit pending unless in cases of idiots, lunatics and infants. *Jones v. Bank of Leadville*, 10 Col. 464; *Davis v. Flagstaff S. U. Co.* 2 Utah, 91; *Hardy v. McClellan*, 53 Miss. 507.

As we have already seen, § 5, ¶ (d), the defendant must have notice of the application. See also as to notice the following cases:

Appearance by defendant in an action solely for the appointment of a receiver does not authorize an appointment without notice at chambers, under Ind. Rev. Stat. 1894, § 1244, providing that receivers shall not be appointed in term or vacation until the adverse party shall have appeared and had reasonable notice of the application, although the appointment might be made in open court. *Winchester Electric Light Co. v. Gordon* (Ind.) 42 N. E. 914.

Sufficient cause within the meaning of Ind. Rev. Stat. 1894, § 1244, forbidding the appointment of a receiver without notice to the adverse party, except upon sufficient cause shown by affidavit, is not shown where it affirmatively appears that notice could easily have been given, and it does not

appear, either by affidavit or by verified complaint, that irreparable or other damage would have resulted from giving the same. *Sullivan Electric Light & P. Co. v. Blue* (Ind.) 41 N. E. 805.

A liberal construction will be given to a complaint in determining its sufficiency so far as it relates to the appointment of a temporary receiver pending the action, but it must state a cause for such appointment; and if the application is made without notice, the cause for an appointment without notice must appear either in the verified complaint or by affidavit, under Ind. Rev. Stat. 1894, § 1244, providing that a receiver shall not be appointed without notice of the application to the adverse party, except upon sufficient cause shown by affidavit. *Sullivan Electric Light & P. Co. v. Blue* (Ind.) 41 N. E. 805.

A mere interlocutory application for a receiver pending suit is not within the provision of Alabama chancery practice rule 77, requiring a note of submission for the hearing. *Jackson v. Hooper* (Ala.) 18 So. 254.

A new receiver may be appointed without notice to an intervening petitioner, where there is nothing to show unfitness or incompetency of the person selected. *Fowler v. Jarvis-Couklin M. T. Co.* 2 Am. & Eng. Corp. Cas. N. S. 391.

The *ex parte* appointment of a receiver of a corporation is void. *People, etc. v. Judge, etc.* 81 Mich. 456.

The appointment without notice is unjustifiable except where it clearly appears that irreparable injury would be done, and in such case a temporary injunction will usually be sufficient. *Fischer v. Super. Ct.* 2 Am. & Eng. Corp. Cas. N. S. 339.

To the above rule there is an exception where a matter is pending in the probate court to set aside a will, and there appears to be no one who has a legal right to deal with the testator's property.' At one time in Ireland it was the practice of the chancery court in certain specified cases to appoint receivers where no bill was pending, but this exceptional practice grew out of the statute known as 4 & 5 Wm. IV chap. 78, § 7; 5 & 6 Wm. IV c. 55, § 31.

§ 14. Rules governing appointment; general principles.

Courts of chancery, and courts exercising chancery jurisdiction, when called upon to exercise the extraordinary power of appointing a receiver and thus wresting from a person the possession of property in advance of a judicial determination of the conflicting interests therein, or adjudication of the rights of claimants thereto, should be governed by certain well defined rules. These by long usage and due regard for the inherent rights of persons, in property, have become universal and everywhere recognized and respected. Chancery jurisdiction, while flexible in its nature and adjusting itself to meet the various conditions that arise in the administration of justice, and affording a remedy therefor, and while it is not enslaved to rules and precedents, as at common law, yet in the very nature of things must take cognizance of certain established principles, which have been deemed essential to the due and proper administration of justice and which conduce to the safety and preservation of the rights of litigants, and be governed by them, at least in spirit. Otherwise it would be possible for the chancellor to become a veritable tyrant. No field of chancery jurisdiction calls for a more zealous recognition of these rules and underlying fundamental principles than that of receiverships.

§ 15. Grounds upon which jurisdiction is entertained.

The grounds upon which the court is usually asked to exercise its jurisdiction, and appoint a receiver are few in number and, stated in general terms, are as follows:

¹*Grinaston v. Turner*, 22 L. T. N. S. 292; *Parkin v. Seddons*, 16 L. R. Eq. Cas. 84, 42 L. J. Ch. 470; *Re Bowman*,

6 S. C. R. Eq. (New So. Wales) 84; *Re Leeming*, 20 L. J. N. S. Ch. 550.

(a) PRESERVATION OF PROPERTY.

The power to appoint receivers is, in all cases, exercised with great caution. There must be a legal or equitable right reasonably clear and free from doubt, attended with danger of loss. The preservation of the subject of the controversy for the benefit of the party who will ultimately be decreed to have the right thereto is the object of committing it to the custody of the receiver.¹ The proper caution having been exercised the appointment may be an efficient means of securing a protection to the parties interested which, otherwise, owing to the delays incident to protracted litigation, would be wholly lost, or at least seriously impaired. Proper caution not having been exercised property may be illegally taken from one rightfully in possession, and his property interests sacrificed without any relief whatever. In the one case the court is a shield and protection; in the other it is an engine of destruction. There is probably no other position in the field of remedial jurisprudence requiring more scrutinizing care on the part of the chancellor than that now under consideration. This is all the more urgent from the fact that the ultimate rights of the parties must be prejudged, to some extent, from a partial examination of the circumstances disclosed by the pleadings and affidavits, often drawn by skillful lawyers, from statements more or less colored by interested parties.

¹*Fort Payne Furnace Co. v. Fort Payne Coal & I. Co.* 96 Ala. 472; *Hughes v. Hatchett*, 55 Ala. 681; *Randle v. Carter*, 62 Ala. 95.

In actions at law property will not be taken from a party in possession, claiming in good faith the right to it, without first exacting from him at whose suit it is done ample security for the protection of his adversary against injury. In actions of detinue and attachment for the seizure of property an adequate bond with good sureties are required to indemnify the defendant against loss. Injunctions and equitable attachments are allowed only on the same conditions. In actions for the appointment of receivers

ordinarily no indemnifying bonds are required, and the consequences that may follow from wresting from the defendant of the property in litigation, are such that the granting of a receiver should, in all cases, be attended with great care and circumspection. *Briarfield Iron Works v. Foster*, 54 Ala. 622; *Fort Payne Furnace Co. v. Fort Payne Coal & I. Co.* 96 Ala. 472.

The appointment of a receiver is unnecessary where the property is a decree of court, of which the receiver could not take possession, it being virtually in the hands of the court. *Scruggs v. Memphis & C. R. Co.* 108 U. S. 868, 27 L. ed. 756.

(b) DANGER OF LOSS.

Perhaps there is no other single ground upon which the appointment of a receiver is based, more often resorted to, and for which the appointment results in more salutary effects than that of loss or danger to the parties in interest, and especially to the plaintiff who by his action puts the machinery of the court into action. Where the fund or property constituting the subject of contention is of such nature as to be subject to waste, deterioration, or serious injury if left in the possession of the defendant; or where the party in possession is guilty of careless management, or wantonness; or where by reason of improper care and attention from any one the property is liable to be lost or damaged from any cause, the court in the exercise of its undoubted right will, by its receiver, take the property or fund into possession, and preserve the same until such time as the rights of the litigants are determined. It not unfrequently happens that property and assets, are charged with the payment of debts, and equitably belong to creditors who, by reason of inadequacy of common law remedies, or otherwise, are not afforded complete protection, and are in danger of losing the benefit of the security to which in equity they are entitled, and in all such cases a receiver is proper.¹ Sometimes the plaintiff may have a lien, or

¹*Parkhurst v. Kinsman*, 3 Blatchf. 78; *Kennedy v. St. Paul & P. R. Co.* 2 Dill. 448; *Orton v. Madden*, 75 Ga. 83; *Harrup v. Winslet*, 37 Ga. 655; *Corcoran v. Doll*, 35 Cal. 476; *Powell v. Quinn*, 49 Ga. 523; *Voshell v. Hynson*, 26 Md. 83; *Haigh v. Burr*, 19 Md. 130; *Thompson v. Diffenderfer*, 1 Md. Ch. 489; *West v. Chasten*, 12 Fla. 815; *Baker v. Backus*, 32 Ill. 79; *Fort Payne Furnace Co. v. Fort Payne Coal & I. Co.* 96 Ala. 472; *Hughes v. Hatchett*, 55 Ala. 631; *Peck v. Trimsaran, Coal, Iron & S. Co.* L. R. 2 Ch. Div. 115.

Although a court of equity has jurisdiction to appoint a receiver to protect and take the administration of the assets into its own hands, it will not exercise this jurisdiction unless there is manifest danger of loss which

may be irreparable. *Randle v. Carter*, 62 Ala. 95.

On a bill filed by a stockholder of a company against a director, to take charge of moneys alleged to have been improperly received and retained by such director, no apprehension of loss being alleged in the bill, and the answer alleging that the money was loaned to the director by the board of directors, a receiver will be refused. *Hager v. Stevens*, 6 N. J. Eq. 374.

A fund will not be taken from one entitled to its custody and transferred to a receiver, unless there is imminent danger of loss. *Rheinstein v. Bizby*, 92 N. C. 307; *Clark v. Dew*, 1 Russ. & M. 103.

In an action for an account and for the cancellation of a deed under

an equitable claim to the property, or other interest therein, and in either case the right to a receiver is enforced where loss is imminent.

It will be seen that the danger of loss here spoken of may be occasioned by the peculiar nature of the subject-matter of the litigation itself, or by reason of the acts or conduct of the person in custody or possession. It may also result from the insolvency or bankruptcy of the defendant in possession and his inability to financially respond for any damage or loss of the property or funds. It will not be availing, however, if the threatened danger is remote, or if the danger is past.¹

(c) FRAUD.

Another ground upon which the court is frequently asked to intercede and appoint a receiver is fraud; and the fraud contemplated in this connection may be consummated fraud, or contemplated fraud. Courts of equity are peculiarly fitted for the detection of fraud and restoring the parties to their rights, and as an efficient means of such restoration a receiver is most usually appointed in such cases.² The allegations of fraud must be spe-

which defendant claims to be the owner of the land which includes a mine, where there is some danger of loss of the tolls received from operating the mine, an order taking the operation of the mine from the defendant and placing it exclusively under a receiver should not be granted where a bond, properly secured, to account for and pay over the proceeds as the court might thereafter direct, would furnish sufficient security. *Stith v. Jones*, 101 N. C. 360.

Pending the litigation, unless there is some evidence that the property is in danger or there is clear proof of fraud in obtaining possession thereof, a receiver will be refused. *Willis v. Cortles*, 2 Edw. Ch. 281.

See also, *Rathbone v. Parkersburg Gas Co.* 31 W. Va. 798; *Mays v. Rose*, Freem. Ch. (Miss.) 708.

As to when a receiver may be ap-

pointed of the tolls of a bridge, see *Covington Drawbridge Co. v. Shepherd*, 62 U. S. 21 How. 112, 16 L. ed. 38.

¹ *Kean v. Colt*, 5 N. J. Eq. 365; *Beecher v. Binniger*, 7 Blatchf. 170. The court in *Mays v. Rose*, Freem. Ch. (Miss.) 708, say the danger of loss may arise "from neglect, waste, misconduct or insolvency of the defendant."

² *Redmond v. Enfield Mfg. Co.* 13 Abb. Pr. N. S. 332; *Powell v. Quinn*, 49 Ga. 523; *Baker v. Backus*, 32 Ill. 79; *State v. Delafield*, 8 Paige, 527; *Thompson v. Diffenderfer*, 1 Md. Ch. 489; *Haight v. Burr*, 19 Md. 130; *Voshell v. Hynson*, 26 Md. 83; *Webb v. First Baptist Church Trustees*, 90 Ky. 117; *Northern P. R. Co. v. St. Paul, M. & M. R. Co.* 47 Fed. Rep. 536, affirmed in 4 U. S. App. 149; *Heard v. Murray*, 93 Ala. 127; *Simmons Hardware Co. v. Waibel*, 1 S. D. 488.

cific and not vague or too general,¹ and the participation of the plaintiff in the fraud is fatal to the application.² A concise statement of the principles governing the appointment of receivers has been given as follows: The plaintiff must show (1) that he has a clear right to the property itself, or (2) that he has some lien upon it, or (3) that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim. In addition to this he must show (1) that the possession of the property was obtained by the defendant by fraud, or, (2) that the property itself, or the income arising from it is in danger of loss.³

(d) INSOLVENCY.

Another ground upon which the courts base the appointment of a receiver in certain cases is that of insolvency of the defendant. This basis for the action of the court most usually arises in cases of insolvent banks,⁴ corporations,⁵ mortgagors,⁶ fraudulent

11 L. R. A. 267; *Meridian News & Pub. Co. v. Diem & W. Paper Co.* 70 Miss. 695; *Buckley v. Baldwin*, 69 Miss. 804; *Re Lewis' Petition*, 52 Kan. 660; *Ellett v. Newman*, 92 N. C. 519; *Nichols v. Perry Patent Arms Co.* 11 N. J. Eq. 126; *Micklethwaite v. Rhoades*, 4 Sandf. Ch. 484; *Gunn v. Blair*, 9 Wis. 852; *West v. Chasten*, 12 Fla. 815; *Lloyd v. Passingham*, 16 Ves. Jr. 59; *St. Louis & S. Coal Min. Co. v. Edwards*, 108 Ill. 472; *Stikwell v. Williams*, 6 Madd. 49, affirmed in Jac. 280; *Hugnonin v. Boseley*, 18 Ves. Jr. 105; *Mitchell v. Barnes*, 22 Hun, 194; *Toule v. American Bldg. & Invest. Co.* 60 Fed. Rep. 181.

¹ *Blonidheim v. Moore*, 11 Md. 365; *Oakley v. Patterson Bank*, 2 N. J. Eq. 178.

² *Hager v. Stevens*, 6 N. J. Eq. 374; *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132.

³ *Mays v. Rose*, Freem. Ch. (Miss.) 708.

⁴ *Hill v. Western & A. R. Co.* 86 Ga. 284; *Atty. Gen. v. Bank of Columbia*, 1 Paige, 511.

⁵ *Middlesex County Bd. of Chosen Freeholders v. State Bank at New Brunswick*, 80 N. J. Eq. 811; *North Carolina S. C. C. R. Co. v. Drew*, 8 Woods, 691; *Buck v. Piedmont & A. L. Ins. Co.* 4 Fed. Rep. 849; *White-water Valley Canal Co. v. Vallette*, 62 U. S. 21 How. 414, 16 L. ed. 154; *Nichols v. Perry Patent Arms Co.* 11 N. J. Eq. 126; *Evans v. Coventry*, 5 DeG. M. & G. 911.

⁶ *Merritt v. Gibson*, 129 Ind. 155, 15 L. R. A. 277; *Hart v. Respess*, 89 Ga. 87; *McMahon v. North Kent Ironworks Co.* [1891] 2 Ch. 148; *Reynolds v. Quick*, 128 Ind. 316; *Thorn v. Nine Reefs, etc.* 67 L. T. 98; *Brown v. Chesapeake & O. Canal Co.* 78 Md. 567; *Quincy v. Cheeseman*, 4 Sandf. Ch. 405; *Hill v. Robertson*, 24 Miss. 368. See further Mortgages, Insolvency

purchasers,¹ trustees,² partners,³ judgment debtors,⁴ executors and administrators,⁵ joint tenants,⁶ dower matters.⁷ But there must be coupled with the allegation of insolvency, also the additional allegations showing plaintiff's right of recovery or probability of recovery, and that such recovery will be wholly lost or substantially impaired by reason of the insolvency.⁸ As in the case of fraud, so also in matters of insolvency the allegations must be specific.⁹ Insolvency as a ground of appointment is predicated upon the general doctrine of probable loss.

¹ *Flagler v. Blunt*, 32 N. J. Eq. 518; *Tufts v. Little*, 56 Ga. 139; *Gunby v. Thompson*, 56 Ga. 316; *Chappell v. Boyd*, 56 Ga. 578; *Pendleton Bros. v. Johnson*, 85 Ga. 840; *Ahlhauser v. Doud*, 74 Wis. 400.

² *Bowling v. Scales*, 2 Tenn. Ch. 63.

³ *Bard v. Bingham*, 54 Ala. 463; *Randall v. Morrell*, 17 N. J. Eq. 343; *Barnard v. Davis*, 54 Ala. 565; *People's Bank v. Fancher*, 21 N.Y. Supp. 545; *Boyce v. Burchard*, 21 Ga. 74; *Williamson v. Wilson*, 1 Bland. Ch. 418; *Heathcot v. Ravenscroft*, 6 N. J. Eq. 113.

That a former trader is engaged in collecting what became due him while in business, and to the bank of which he is president after the sale of his business and stock of goods, does not make him a trader within Ga. Code, §§ 3149a *et seq.*, providing for the appointment of a receiver for an insolvent trader on a bill filed by his creditors. *Mercer v. Houston Guano & W. Co.* (Ga.) 123 S. E. 638.

A suit by a corporation for the purpose of obtaining an injunction does not prevent another court from appointing a receiver on the ground of insolvency. *San Antonio, etc. G. D. R. Co. v. Davis*, 2 Am. & Eng. Corp. Cas. N. S. 374.

⁴ *Shannon v. Hanks*, 88 Va. 338; *Dunlap v. Hedges*, 35 W. Va. 237; *McCord v. Weil*, 33 Neb. 868; *Oyden v. Chalfant*, 32 W. Va. 559.

⁵ *Johns v. Johns*, 23 Ga. 31; *Jenkins v. Jenkins*, 1 Paige, 243; *Williams v. Jenkins*, 11 Ga. 595.

⁶ *Street v. Anderton*, 4 Bro. C. C. 414.

Sandford v. Ballard, 80 Beav. 109; *Bryan v. Moring*, 94 N. C. 699.

⁷ *Chase's Case*, 1 Bland. Ch. 206.

⁸ *Gregory v. Gregory*, 1 Jones & S. 86; *Chase's Case*, 1 Bland. Ch. 206; *McNair v. Pope*, 96 N. C. 502; *Rollins v. Henry*, 77 N. C. 467; *Lawrence Iron Works Co. v. Rockbridge Co.* 47 Fed. Rep. 755; *Owen v. Homan*, 4 H. L. Cas. 397, 3 Macn. & G. 378; *Commissioners, etc. v. Lockhart*, Ir. Rep. 3 Eq. 515; *Cufer v. Echerson*, 6 Iowa, 502; *Cox v. Peters*, 13 N. J. Eq. 39.

⁹ *West v. Swan*, 3 Edw. Ch. 420.

See further on subject of insolvency, Corporations and Railways.

Where a bill was filed by a purchaser at a sheriff's sale, alleging irreparable mischief from defendant's insolvency and for injunction, and it appeared that the defendant entered by virtue of a lease made before the sheriff's sale, a receiver was not appointed, it being inconsistent with the prayer of the bill. *Burns v. Campbell*, 3 Jones Eq. 410.

A decree appointing a receiver need not contain a finding of insolvency, where the application for the appointment alleges insolvency and the answer admits it. *Reliance Lumber Co.*

(e) PLAINTIFF'S TITLE.

It is also a well established rule in the appointment of receivers where the matter of title is involved in the issue that the plaintiff by his bill, petition or other showing, must establish in himself a strong presumptive title,¹ or a strong presumption against the defendant's title,² and there must be coupled with this showing a danger of loss or injury, or insolvency.³ And where it appears that the title to the property is in dispute and this is an issue in the case, and the rights of all parties therein are threatened, or where the property is *in medio*, a receiver should be appointed.⁴ But where the case involves simply a dry legal title, a court of equity will refuse to interfere and leaves the plaintiff to his remedy at law,⁵ and this too though the property may be vacant.⁶ The rule has sometimes been stated as fol-

v. Brown, 4 Ind. App. 92; *Turnbull v. Prentiss Lumber Co.* 55 Mich. 397.
¹ *Durant v. Crouell*, 97 N. C. 367; *McNair v. Pope*, 96 N. C. 502; *Bryan v. Moring*, 94 N. C. 694; *Twitty v. Logan*, 80 N. C. 69; *Leveson v. Elson*, 88 N. C. 182; *Horton v. White*, 84 N. C. 297; *Ashurst v. Lehman*, 86 Ala. 370; *Emerson and Wall's Appeal*, 95 Pa. 250; *Schlect's Appeal*, 60 Pa. 172; *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 83; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *Beecher v. Binninger*, 7 Blatchf. 170; *Steele v. Aspy*, 128 Ind. 367; *Vause v. Woods*, 46 Miss. 120; *Norris v. Luke*, 89 Va. 518; *Ellwood v. Greenleaf First Nat. Bank*, 41 Kan. 475; *Cole v. O'Neill*, 3 Md. Ch. 174; *Clark v. Ridgely*, 1 Md. Ch. 70; *Mapes v. Scott*, 4 Ill. App. 268; *Coser v. Echerson*, 6 Iowa, 502; *Chase's Case*, 1 Bland. Ch. 206; *Smith v. Wells*, 20 How. Pr. 158; *Willis v. Corlies*, 2 Edw. Ch. 287; *Gregory v. Gregory*, 1 Jones & S. 1; *Lloyd v. Passingham*, 16 Ves. Jr. 59; *Bambridge v. Boddeley*, 3 Macn. & G. 418; *Owen v. Homan*, 3 Macn. & G. 373, 4 H. L. R. Cas. 997; *Lancashire v. Lancashire*, 9 Beav. 120;

Talbot v. Hope Scott, 4 Kay & J. 96; *Parkin v. Seddons*, L. R. 16 Eq. 34; *De Walt v. Kinard*, 19 S. C. 286.

² *Stilwell v. Williams*, 6 Madd. 49; *Hugnonin v. Bosely*, 13 Ves. Jr. 105; *Mapes v. Scott*, 4 Ill. App. 268.

³ Cases under note 1 above.

⁴ *Graham v. Fuller Electrical Co.* 75 Ga. 878; *United States v. Church of Jesus Christ of L. D. S.* 5 Utah, 361; *Hlawacek v. Bohman*, 51 Wis. 92; *Owen v. Homan*, 4 H. L. Cas. 997, 17 Jur. 861; *Mills v. Pittman*, 1 Paige, 490; *Chamberlain v. Marble*, 24 Miss. 586; *Berry v. Keen*, 51 L. J. Ch. 912. See *Rollins v. Henry*, 77 N. C. 467.

⁵ *Mapes v. Scott*, 4 Ill. App. 268; *Lenox v. Notrebe*, Hempst. 225.

⁶ *Carrow v. Ferrior*, 37 L. J. Ch. 569, L. R. 3 Ch. 719; *Talbot v. Hope Scott*, 4 Kay & J. 96, 4 Jur. N. S. 1172, 27 L. J. Ch. 273; *Lancashire v. Lancashire*, 9 Beav. 120, 15 L. J. Ch. N. S. 54; *Mordaunt v. Hooper*, Ambl. 311; *Dobbin v. Adams*, 8 Ir. Eq. 157; *Clark v. Dew*, 1 Russ. & M. 103; *Knight v. Duplessis*, 2 Ves. Sr. 380; *Tolderry v. Colt*, 1 Young & C. 621, 5 L. J. Exch. Eq. 25.

lows: Where the issue is simply a question of title between the plaintiff and defendant and in the absence of fraud, serious injury or imminent danger of loss, the court will refuse to interfere until the plaintiff has first established in a common law proceeding his legal right.¹ In other cases the general rule has been stated that to entitle the plaintiff to relief he must show a reasonable probability of recovery, based on a strong title in himself, and this must be coupled with imminent danger of loss,² and suit be brought within a reasonable time.³

(f) REMEDY AT LAW.

Where the plaintiff may be able to obtain ample redress and protection by the usual course of legal proceedings a court of equity will not appoint a receiver.⁴ This of course is based upon the general principle of equity jurisprudence that a court of equity refuses to lend its aid and grant relief where the common law courts can furnish adequate remedy.

¹ See cases in note 1, p. 43; also *Lloyd v. Passingham*, 16 Ves. Jr. 59; and see specially *Talbot v. Hope Scott*, 4 Kay & J. 96; *Davis v. Reaves*, 2 Lea, 649; *Vause v. Woods*, 46 Miss. 120; *Earl of Fingal v. Blake*, 2 Moll. 50; *Smith v. Smith*, 2 Younge & C. 351, 10 Hare Appx. LXXI; *Siloe v. Bishop of Norwich*, 3 Swanst. 112 n; *Pignoleh v. Bushe*, 28 Hows. Pr. 9; *Kipp v. Hanna*, 2 Bland's Ch. 26; *Harrup v. Winslet*, 87 Ga. 655; *West v. Chosten*, 12 Fla. 315; *Callanan v. Shaw*, 19 Iowa, 183.

² See note 1, p. 43; also *Mayo v. MoPhaul*, 71 Ga. 758; *Fingal v. Blake*, 2 Moll. 78; *Lloyd v. Trimleston*, 2 Moll. 78; *Mordaunt v. Hooper*, Ambl. 311; *Bainbrigg v. Baddeley*, 3 Macn. & G. 414; *Owen v. Homan*, 3 Macn. & G. 378; *Oofer v. Echerson*, 6 Iowa, 502; *Gregory v. Gregory*, 1 Jones & S. 1; *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 83; and see a clear statement of the doctrine of the text by Lord Erskine in *Hug-*

nonin v. Basely, 18 Ves. Jr. 105; and see Lord Truro in *Bainbrigg v. Baddeley*, *ante*.

³ *Skinner's Co. v. Irish Soc.* 1 Myl. & C. 162, *Commissioners, etc. v. Lockhart*, Ir. R. 8 Eq. 515.

⁴ *Pearce v. Jennings*, 94 Ala. 524; *Pelzer v. Hughes*, 27 S. C. 408 (see statute); *Baltimore & O. Teleg. Co. v. Interstate Teleg. Co.* 54 Fed. Rep. 50; *Ellershank v. Russell*, 6 Australian L. T. (Victoria) 140; *Manchester, etc. v. Parkinson*, L. R. 22 Q. B. Div. 173, 58 L. J. Q. B. 262; *Parker v. Moore*, 3 Edw. Ch. 234; *Minkler v. United States Sheep Co.* 8 Am. & Eng. Corp. Cas. N. S. 368.

The court has no right to appoint a receiver merely because under the circumstances of the case it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution. It is otherwise, however, if there is a threatened fraudulent conveyance to make way

§ 16. When jurisdiction not entertained.

There are many cases which are not susceptible of being classified where courts in the exercise of a sound judicial discretion have refused to appoint a receiver, as where the person in possession of the fund or property is not a party to the suit, or where he claims under the plaintiff;¹ or where the property and owner are beyond the jurisdiction of the court;² or where the plaintiff's claims are mere open accounts, no liens existing;³ or where the plaintiff is a trust or monopoly engaged in the conduct of business in restraint of trade;⁴ or where the receivership is sought to be extended over the future earnings of a judgment debtor;⁵ or over a pension fund.⁶ The list of such refusals might be extended indefinitely, but most of such cases are *sui generis* and do not involve general and well established principles and will not be considered.

§ 17. Effects of appointment.

The results that follow the appointment of a receiver are numerous. Some of the most usual may be enumerated as follows:

(a.) By the appointment and the taking of possession, through

with the debtor's property. *Harris v. Beauchamp* [1894] 1 Q. B. 801, 68 L. J. Q. B. 480.

See also *Carrow v. Ferrior*, L. R. 8 Ch. App. 719; *Pfets v. Pfets*, 14 Md. 376; *Winkler v. Winkler*, 40 Ill. 179 (Inj.); *Coughron v. Swift*, 18 Ill. 414 (Inj.); *Sherman v. Clark*, 4 Nev. 138; *Parmley v. Tenth Ward Bank*, 3 Edw. Ch. 395; *Corey v. Long*, 43 How. Pr. 497, 12 Abb. Pr. N. S. 427; *Rice v. St. Paul & P. R. Co.* 24 Minn. 464; *Speights v. Peters*, 9 Gill. 476; *Morrison v. Buckner*, Hempst. 442; *Sollory v. Leaver*, L. R. 9 Eq. 22; *Thayer v. Swift*, Harr. Ch. (Mich.) 430; *Cassidy v. Meacham*, 3 Paige, 811; *Congden v. Lee*, 3 Edw. Ch. 304; *Starr v. Rathbone*, 1 Barb. 70; *Smith v. Thompson*, Walk. Ch. 1; *Second Ward Bank v. Upmann*, 12 Wis. 499; *Steward v. Stevens*, Harr.

Ch. (Mich.) 169; *Buckeye Engine Co. v. Donau Brew. Co.* 47 Fed. Rep. 6. It makes no difference in rule that the common law proceeding may be difficult. *Cremen v. Hawkes*, 8 Ir. Eq. 153, 503.

See also note 2, § 11.

¹*Mays v. Wherry*, 3 Tenn. ch. 34; *Levi v. Karrick*, 18 Iowa, 844; *Vincent v. Parker*, 7 Paige, 65.

²*Field v. Ripley*, 20 How. Pr. 26.

³*Virginia T. & C. Steel & I. Co. v. Wilder*, 88 Va. 942; *Carter v. Hightower*, 79 Tex. 185.

⁴*American Biscuit Co. v. Klotz*, 44 Fed. Rep. 721.

⁵*Holmes v. Millage* [1898] 1 Q. B. 551 (unless they have been assigned).

⁶*Lucas v. Harris*, L. R. 18 Q. B. Div. 127, 56 L. J. Q. B. 15.

its receiver, of all the property and effects of the defendant, the court secures the power to control, at its discretion, all controversies affecting the property. Otherwise the fruits of the receivership would necessarily be endangered, if not entirely lost.¹ Also the receiver, as a rule, is empowered to prosecute and defend, under the direction of the court, all pending suits and proceedings, in the name of the original plaintiff or defendant.² After the property has passed into the hands of a receiver the defendant whose property is thus taken will not be permitted to be sued, at least so far as liability growing out of the management of the receivership property is concerned,³ except in some

¹The property in the receiver's possession must not be levied on. *Wisswell v. Sampson*, 55 U. S. 14. How. 52, 14 L. ed. 322; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Walling v. Miller*, 108 N. Y. 173; *Thompson v. McCleary*, 159 Pa. 189; *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 109; *Russell v. Texas & P. R. Co.* 68 Tex. 646; *Edwards v. Norton*, 55 Tex. 405; nor distrained for rent due; *Marshall v. Lockett*, 76 Ga. 289; nor taken by force; *Ex parte Cochrane*, L. R. 20 Eq. 282; *Re Day*, 84 Wis. 638; *Atty. Gen. v. St. Cross Hospital*, 18 Beav. 601; nor interfered with by ejectment in another court; *Potter v. Spa Spring Brick Co.* 47 N. J. Eq. 442; *Fort Wayne, M. & C. R. Co. v. Mellett*, 92 Ind. 535; nor taken for taxes; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689. See also, *Howell v. Hough*, 46 Kan. 152; *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225; *Brown v. Carolina C. R. Co.* 83 N. C. 128; *Skinner v. Maxwell*, 68 N. C. 400; *Noe v. Gibson*, 7 Paige, 513. In *McGean v. Metropolitan Elev. R. Co.* 133 N. Y. 9, the court say: "No principle has been more frequently asserted or is so well established as that where a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes and proceed to a final determination of all the matters at issue. To such

an extent has the doctrine been carried that it has been declared that if the controversy contains an equitable feature, or requires any purely equitable relief belonging to the exclusive jurisdiction of equity, or pertaining to the concurrent jurisdiction of equity and law, and a court of equity thus acquires a partial cognizance of an action, it may go to a complete adjudication and establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." See further title Receiver's Possession. But the court will not draw to itself by means of the receivership jurisdiction to try disputed titles to property unless the circumstances are such as to render the common law remedies inadequate or for some reason are unfit for the purposes of the particular case. *Merchants & M. Nat. Bank v. Kent*, 43 Mich. 292.

²*Phoenix Warehousing Co. v. Badger*, 6 Hun, 293.

³*Hicks v. International & G. N. R. Co.* 62 Tex. 38; *Ryan v. Hays*, 62 Tex. 42; *Ohio & M. R. Co. v. Davis*, 23 Ind. 554; *Bell v. Indianapolis C. & L. R. Co.* 53 Ind. 57; *Metz v. Buffalo, C. & P. R. Co.* 58 N. Y. 61; *Rogers v. Mobile & O. R. Co.* 12 Am. & Eng. R. Cas. 442.

cases for the purpose of establishing the amount due, or settling some disputed question of fact.

(b) The appointment of a receiver removes the parties in possession of property, who are parties to the suit, from the custody and control thereof and pending the litigation terminates all rights growing out of such possession.¹ But, as we have seen elsewhere, one in possession under a *prima facie* title cannot be deprived of such possession by a receiver at the suit of creditors of the debtor unless a showing is made of danger of the property being lost, or materially injured, or that the sale to the defendant is fraudulent, and that he will be turned out of possession at the hearing.² The effect of the appointment of a receiver is to vest in him the title to the personal property, choses in action and equitable interests of the debtor, over which the receivership extends without a formal assignment.³ This principle, of course, has particular application to creditor's proceedings, and not to mortgage foreclosures or other proceedings relating to specific property. In some cases the defendant is permitted to remain in possession pending the receivership and the receivership is extended to the rents and profits only.

(c) A court having jurisdiction, and having appointed a receiver over the property which is the subject-matter of the suit, and the receiver having taken possession of such property, no other court of co-ordinate jurisdiction can interfere with the property, or entertain complaints against the receiver or remove

¹*Payne v. Baxter*, 2 Tenn. Ch. 517; *Shaw v. Wright*, 3 Ves. Jr. 22; *McDonnell v. White*, 11 H. L. Cas. 570.

The party in possession is bound to turn over to the receiver all goods in his possession upon demand if he knows of the order requiring him to do so; he needs no official notice. *Lewis v. Singleton*, 61 Ga. 164.

A court of equity may call in the assets of the estate from the personal representative, and place them in a receiver's hands. *Davis v. Chapman*, 88 Va. 67.

²*Felzer v. Hughes*, 27 S. C. 408.

Nor will a tenant be required to attorn to a receiver where the tenancy

is not clear and where the right of purchase is set up. *Bydon v. Innes*, 5 W. W. & A. B. (Victoria Eq.) 189; *Sercomb v. Catlin*, 128 Ill. 556.

³*Tillinghast v. Champlin*, 4 R. I. 173; *Albany City Bank v. Schermerhorn*, Clark Ch. 297; *Mann v. Pentz*, 2 Sandf. Ch. 257; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Iddings v. Bruen*, 4 Sandf. Ch. 223; *Wilson v. Allen*, 6 Barb. 542.

As to the necessity of a formal transfer of real estate to the receiver, see *Young v. Clapp*, 147 Ill. 176; *Wilson v. Wilson*, 1 Barb. Ch. 592; and see § 22 ¶ 1, note 3.

him.¹ The ground upon which this doctrine is based has peculiar application to cases where a receiver is appointed, but is not confined to that class of cases. Practice has demonstrated the reasonableness of the rule and reason suggests the propriety of its enforcement. In a few cases there has been a departure from the doctrine, to some extent, but usually it has been from the lack of an observance of the proper comity between state and federal courts. The great weight of authority, however, is in favor of the rule.

(d) The appointment does not in any manner change the title to or right of possession of the property, but merely places in the receiver its custody for the benefit of the party ultimately found to be entitled to it.² The receiver is a trustee for all parties

¹ *Young v. Montgomery & E. R. Co.* 2 Woods, 606; *O'Mahoney v. Belmont*, 62 N. Y. 133; *State v. Jacksonville P. & M. R. Co.* 15 Fla. 201; *Gest v. New Orleans, St. L. & C. R. Co.* 30 La. Ann. pt. 1, 28; *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 109. In this case an officer made a levy before the appointment of a receiver, and sold the property after the appointment. Held, the sale was void.

Walling v. Miller, 108 N. Y. 173; *Nelson v. Conner*, 6 Rob. (La.) 339; *Winfall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322. See contra, *Chautauqua Bank v. Risley*, 19 N. Y. 369.

Although the proceedings for the appointment of a receiver were erroneous, yet if they were not void the possession of the receiver is legal, and he cannot be dispossessed at the suit of another receiver subsequently appointed by a court of co-ordinate jurisdiction. *Bonner v. Hearne*, 75 Tex. 142.

See also: *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 43 N. J. Eq. 211; *Young v. Rollins*, 85 N. C. 485; *McCarthy v. Peake*, 18 How. Pr. 138, 9 Abb. Pr. 164; *Watkins v. Pinkney*, 3 Edw. Ch. 533; *Storm v. Waddell*, 2

Sandf. Ch. 494; *Gaylord v. Fort Wayne, M. & C. R. Co.* 6 Biss. 236; *Conkling v. Butler*, 4 Biss. 23; *Bill v. New Albany, &c. R. Co.* 2 Biss. 390; *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.* 6 Biss. 197; *Beecher v. Biningar*, 7 Blatchf. 170; *Platt v. Archer*, 9 Blatchf. 559; *Sedgwick v. Menck*, 6 Blatchf. 156, 1 Bank Reg. 230; *Spinning v. Ohio L. Ins. Co.* 2 Disney, 336; *Judd v. Bankers & M. Teleg. Co.* 31 Fed. Rep. 182; *Davis v. Alabama & F. R. Co.* 1 Woods, 661; *Hutchinson v. Green*, 6 Fed. Rep. 833; *Bruce v. Manchester & K. R. Co.* 19 Fed. Rep. 342; *May v. Printup*, 59 Ga. 129; *Re Olark*, 4 Ben. 88; *Liggett v. Glenn*, 4 U. S. App. 438, 51 Fed. Rep. 381. But see *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 409; *Merchants & P. Nat. Bank v. Masonic Hall Trustees*, 63 Ga. 549; *South Carolina R. Co. v. People's Sav. Inst.* 64 Ga. 18; *East Tennessee & G. R. Co. v. Atlanta & F. R. Co.* 49 Fed. Rep. 606, 15 L. R. A. 109; *Eisenmann v. Thiel*, 1. Cin. Sup. Ct. 188; *Re Merchants Ins. Co.* 3 Biss. 162.

² *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 34 L. ed. 341; *Owen v. Kellogg*, 56 Hun., 455; *Na-*

concerned, and his appointment being remedial in its nature is effective simply as conserving and enforcing the rights of parties.

tional Ezch. Bank v. Beal, 50 Fed. Rep. 355; *Skip v. Harwood*, 8 Atk. 564; *Anon.* 2 Atk. 15; *Pringle v. Woolworth*, 90 N. Y. 502; *Wiswall v. Sampson*, 55 U. S. 14 How. 53, 14 L. ed. 322; *Atty. Gen. v. Atlantic & Mut. L. Ins. Co.* 100 N. Y. 279; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Maynard v. Bond*, 67 Mo. 315; *Herman v. Fisher*, 11 Mo. Mo. App. 275; *Portman v. Mill*, 8 L. J. N. S. Ch. 161; *Detroit First Nat. Bank v. Barnum Wire & L. Works*, 60 Mich. 487.

As a rule the receiver takes no title to the property. *Matthews v. Cooper*, 49 N. Y. S. R. 792.

The receiver is the hand of the law and the law conserves and enforces rights—never destroys them. His appointment determines no right and in no way affects the title of any party to the property in litigation. *Von Roun v. San Francisco Sup. Ct.* 58 Cal. 358. He holds the property subject to all liens of every kind.

While property is in the hands of a receiver, or under the control of the court, no execution can be levied upon it; but the *fi. fa.* creates a lien thereon. *Davis v. Bonney*, 89 Va. 755.

A receiver is an officer of the court, but his appointment determines no right, nor does it affect the title of the property in any way; it will not prevent the running of the statute of limitations. His holding is the holding of the court for him from whom the possession was taken. He is appointed on behalf of all parties and if any loss arises from deficiency in his accounts the estate must bear it. *Ellis v. United States Ins. Co.* 7 Md. 307.

If the appointment of a receiver interferes with the rights of a stranger

to the suit, he may apply to the court for the protection of his rights, though he cannot have the benefit of the receivership. *Howell v. Ripley*, 10 Paige, 48.

A receiver of the effects of an insolvent auctioneer was appointed. The auctioneer had sold goods for a party and with his knowledge and consent deposited the money arising therefrom to his general account at the bank. After the appointment and notice thereof to the bank, the auctioneer drew a check in favor of this principal for the amount due him and gave him an assignment of an amount on demand equal to the amount of the check. *Held*, that the principal thereby gained no right to the moneys on deposit, nor of action against the bank. All title to the moneys passed to the receiver on the day of his appointment and by virtue thereof. *Levy v. Cavanagh*, 2 Bosw. 100.

See *Ex parte Dunn*, 8 S. C. 207; *Beverly v. Brooke*, 4 Gratt. 187; *Southern Bank v. Ohio Ins. Co.* 22 Ind. 181; *Montgomery v. Merrill*, 18 Mich. 388; *Van Alstyne v. Cook*, 25 N. Y. 489; *Davenport v. Kelly*, 42 N. Y. 193; *Gere v. Dibble*, 17 How. Pr. 31; *Becker v. Torrance*, 31 N. Y. 631; *Crine v. Davis*, 68 Ga. 188; *State v. Snohomish County Super. Ct.* 7 Wash. 77; *State v. Chehalis County Super. Ct.* 8 Wash. 210.

The appointment of a receiver in a suit to foreclose a mortgage against a lessee will not deprive the lessor of the right to obtain possession of the premises under the forcible entry and detainer statute. *Woodward v. Winchill* (Wash.) 44 Pac. 860.

(e) The right to custody of property relates to the custody of such personal property as is within the jurisdiction of the court making the appointment.¹ The general doctrine is that the powers of a receiver over the property of the defendant are coëxtensive only with the jurisdiction of the court making the appointment, it being the policy of every government to retain in its own hand the property of a debtor until all domestic claims against it have been satisfied.² But courts on the ground of comity are disposed to permit suits to be brought by a foreign receiver where such suits do not affect the rights of citizens of the state where suit is brought.³ This principle of comity is in accordance with

¹*Humphrey v. Hopkins*, 81 Cal. 551, 6 L. R. A. 792; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *Farmers', etc. v. Needles*, 52 Mo. 1; *Tully v. Herrin*, 44 Miss. 626; *Kronberg v. Elder*, 18 Kan. 150; *Moseby v. Burrows*, 52 Tex. 396; *Hunt v. Columbian Ins. Co.* 55 Me. 290; *Filkins v. Nunne-macher*, 81 Wis. 91; *McClure v. Campbell*, 71 Wis. 350.

²*Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.* 108 Ill. 317. But where a receiver has reduced the property to his possession, and in the course of his business as such receiver takes the property into a foreign jurisdiction he may defend his title to such property as against attaching creditors of such foreign jurisdiction, on the ground that where a legal title to personal property has once passed and become vested in accordance with the law of the state where situated the validity of such title will be recognized everywhere. *Cammell v. Sewell*, 5 Hurlst. & N. 728; *Mosby v. Burrow*, 52 Tex. 396; *Clark v. Connecticut Peat Co.* 85 Conn. 303; *Taylor v. Boardman*, 25 Vt. 541; *Crapo v. Kelly*, 83 U. S. 16 Wall. 610, 21 L. ed. 430; *Waters v. Barton*, 1 Coldw. 450; *Pond v. Cooke*, 45 Conn. 126; *Cagill v. Wool-dridge*, 8 Baxt. 580; *Killmer v. Hobart*,

58 How. Pr. 452; *Brownell v. Manchester*, 1 Pick. 232; *McAlpin v. Jones*, 10 La. Ann. 552; *Low v. Burrows*, 12 Cal. 181; *Lewis v. Adams*, 70 Cal. 403; *Boyle v. Townes*, 9 Leigh. 158; *Singerly v. Fox*, 75 Pa. 114. See *contra*, *Humphrey v. Hopkins*, 81 Cal. 551, 6 L. R. A. 792; not, however, if the taking of such property to a foreign jurisdiction is for an illegal purpose. *Dick v. Bailey*, 2 La. Ann. 974; *Drake*, Attach. (5th ed.) § 292.

Courts are sometimes enabled to reach property of a defendant in a foreign jurisdiction by injunction where the owner of such property is a resident and subject to the jurisdiction of the court and amenable to its orders. *Mitchell v. Bunch*, 2 Paige, 606; *Roberdeau v. Rous*, 1 Atk. 544; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225; *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414. See *Young v. Clapp*, 147 Ill. 176; *Hoyt v. Thompson*, 5 N. Y. 320; *Hoyt v. Thompson*, 19 N. Y. 207; *Wil-kits v. Waite*, 25 N. Y. 577.

³*Olney v. Tanner*, 10 Fed. Rep. 101; *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174; *Hurd v. City of Elizabeth*, 41 N. J. L. 1; *Hunt v. Columbian Ins. Co.* 55 Me. 290; *Saunders v. Williams*, 5

the genius of our government and is gradually becoming more firmly established as part of the system of national jurisprudence, and its recognition by courts fosters and sustains the unity and harmony that should everywhere prevail and especially so in all matters pertaining to property rights and commercial relations. The tendency in England, and in this country, as will be seen elsewhere, is in the direction of a recognition of the validity of the transfer of personal property by the owner at the place of his domicil, voluntary or by operation of law, as being effective in all jurisdictions no matter where the property may be located.

(f) The effect of the appointment of a receiver is to leave the rights of all parties as they are found at the time of the appointment, with respect to existing contracts, mortgages, liens, etc., out of which their rights have arisen.¹ This principle is universal

N. H. 213; *Bagby v. Atlantic M. & O. R. Co.* 86 Pa. 291; *Johnson v. Purker*, 4 Bush, 149; *Taylor v. Columbian Ins. Co.* 14 Allen, 853; *Pierce v. O'Brien*, 129 Mass. 314. See note in *Alley v. Caspari*, 6 Am. St. Rep. 178, 80 Me. 234.

A receiver of an insolvent railroad corporation was appointed in Kentucky, pending suits upon mortgages of the road and its equipments, including certain rolling-stock, which was included in the property of which the receiver had been ordered to take possession. Held, that upon principles of interstate comity, the receiver would be allowed to institute, in Ohio, proceedings to obtain possession of the rolling-stock, notwithstanding the attachment. *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174; *Holmes v. Sherwood*, 3 McCrary, 405, 16 Fed. Rep. 725; *Boulware v. Davis*, 90 Ala. 207, 9 L. R. A. 601; *Pugh v. Hurtt*, 52 How. Pr. 22; *Re Waite*, 99 N. Y. 483; *Metzner v. Bauer*, 98 Ind. 425; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Bidlock v. Mason*, 26 N. J. Eq. 230; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Henning v. Raymond*, 35 Minn. 308.

¹*Central Trust Co. v. Wabash, St. L. & P. R. Co.* 46 Fed. Rep. 26; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379; *Hoffman v. Schoyer*, 143 Ill. 598; *Cox v. Volkert*, 86 Mo. 505; *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539; *Mulcahey v. Strauss*, 151 Ill. 70.

A receiver to sequester the property of a corporation and apply it to the payment of corporate debts cannot question the validity of a mortgage executed by the corporation to secure the debt of its president, where none of the creditors represented by him were such at the execution of the mortgage. *Osborn v. Montelac Park*, 89 Hun, 177, 35 N. Y. Supp. 610.

A receiver's possession is subject to all valid and existing liens upon the property at the time of his appointment, and does not divest a lien previously acquired in good faith. *Chicago Title & T. Co. v. Smith*, 158 Ill. 417, 41 N. E. 1076.

A transfer to a trustee of accounts belonging to a corporation, duly made and noted on the books of the corporation under authority of the board of directors and accepted by the

in its application and in the very nature of equity jurisprudence could not be otherwise. The adjudication of the rights of parties and the application of adequate remedies through the instrumentality of courts, is fundamental in its nature. The contractual relations of parties fairly made and duly ascertained are not subject to judicial modification or change.

(g) The rights of the receiver date back to the time of granting the order,¹ though it has been held that the date of filing the

trustee in writing, with notice from him to the parties whose accounts are assigned, and also to the persons for whom he is acting as trustee, is sufficient to vest in the trustee the right to the money derived from the accounts, although on the same day, but subsequent to such transfer, a bill was filed for the appointment of a receiver and the winding up of the affairs of the corporation. *Chicago Title & T. Co. v. Smith*, 153 Ill. 417, 41 N. E. 1076.

The right of the assignee in bankruptcy of a firm to bring any and all suits which concern the estate or trust is not affected by the appointment of a receiver of the property of an individual holding assets of the firm in trust, and the passing of the legal title to such receiver. *Shainwald v. Davids* (D. C. N. D. Cal.) 69 Fed. Rep. 687.

A judgment creditor is not affected by the appointment of a receiver for the debtor in proceedings to which he was not a party and in which he was not required to intervene. *Central Coal & C. Co. v. Southern Nat. Bank* (Tex. Civ. App.) 34 S. W. 383.

A motion for authority to levy upon property in the hands of a receiver will not be granted except upon notice to the claimants of the property who are parties to the original suit, as notice to the receiver is not notice to

them. *Re Hall & S. Co.* (C. C. S. D. Cal.) 69 Fed. Rep. 425.

The lien of a judgment against a corporation, obtained after the appointment of a receiver, but before the filing of his official bond, is not destroyed by the filing of such bond although his title dates back to the time of the appointment for the preservation and protection of the property, where the judgment would have been rendered before his appointment but for the interposition of a frivolous demurrer. *Re Lewis & F. Mfg. Co.* (Sup. Ct.) 34 N. Y. Supp. 983.

One who purchases property at a time when all the property of the grantor is subject to a judgment lien is, as against a receiver subsequently appointed over the grantor's property, entitled to have the remainder of the property in his hands subjected to the lien in exoneration of that purchased by him. *Semple v. Eubanks* (Tex. Civ. App.) 35 S. W. 509.

¹*Pope v. Ames*, 20 Or. 199; *Ex parte Tullman*, 98 Ala. 101; *Bonner v. Hearne*, 75 Tex. 242; *Re Christian Jensen Co.* 128 N. Y. 550; *Steele v. Sturges*, 5 Abb. Pr. 442; *Rutter v. Tallis*, 5 Sandf. 610; *Re Schuyler's Steam Tow Boat Co.* 136 N. Y. 168, 20 L. R. A. 391; *Clinkscates v. Pendleton Mfg. Co.* 9 S. C. 318; *Regenstein v. Pearlstein*, 80 S. C. 192; *Maynard v. Bond*, 67 Mo. 315; *Ex parte Evans*, L.

bill fixes the rights of the parties.¹ While there is not entire harmony in the decisions the weight of authority undoubtedly is that the order appointing the receiver fixes the date from which the property is regarded as being *in custodia legis*, and from which time it is not subject to levy of execution or attachment.² The receiver's right to possession, however, as well as his right to sue are dependent on his giving bond as required by the order of appointment.³

(h) The property over which the receivership extends varies according to the nature of the proceeding. Sometimes, as in the case of mortgage foreclosures, it merely extends to the rents and profits of the mortgaged premises, sometimes to the whole property as in partnerships, corporations, etc., and sometimes to only sufficient property to satisfy the demand of encumbrancers.⁴ The order making the appointment should be specific as to the property intended to be embraced in the receivership.⁵ This is necessary in order that the receiver may be protected, and as notice to third parties.

R. 18 Ch. Div. 252; *Re Birt*, L. R. 23 Ch. Div. 604; *Wickens v. Townshend*, 1 Russ. & M. 861.

¹*Fogg v. Supreme Lodge of U. O. of G. T.* 159 Mass. 9.

An order appointing a receiver cannot, as against strangers to the suit not notified of the application for the order, relate back to the commencement of the action in which it is made, *Artisans Bank v. Treadwell*, 34 Barb. 553; *Phillips v. Smoot*, 1 Mackey, 478. But see *Farmers' Bank v. Beaton*, 7 Gill & J. 421.

If by an order of court the matter of appointment is referred to a master, and on the coming in of his report recommending an appointment, an order of appointment is made, the first order is regarded as being the date from which the receiver's rights are to be determined. *Rutter v. Talke*, 5 Sandf. 610.

²See note 1 above, *Contra: Farmers' Bank v. Beaton*, 7 Gill & J. 421; *De Fries v. Creed*, 34 L. J. Ch. N. S. 607;

Edwards v. Edwards, L. R. 2 Ch. Div. 291; *Woods v. Ellis*, 85 Va. 471.

³*De Fries v. Creed*, 34 L. J. Ch. N. S. 607; *Edwards v. Edwards*, L. R. 2 Ch. Div. 291; *Johnson v. Martin*, 1 Thomp. & C. 504; *Morgan v. Potter*, 17 Hun, 403; *Contra, Ex parte Evans*, L. R. 18 Ch. Div. 252.

Where the receiver is ordered to sue, and has done so, and there is an entire want of showing as to his having given bond, the court will presume that he has complied with the order in this regard. *Hedgewisch v. Silver*, 140 N. Y. 414.

⁴*Magrath v. Veitch*, 1 Hog. 110; *Re Schuyler Steam Tow Boat Co.* 43 N. Y. S. R. 163; *Showalter v. Laredo Improv. Co.* 83 Tex. 162. In a railroad foreclosure the receiver has no custody or control except of the property covered by the mortgage. *Smith v. McCullough*, 104 U. S. 25, 26 L. ed. 637.

⁵*Crow v. Wood*, 13 Beav. 271; *O'Mahoney v. Belmont*, 62 N. Y. 183.

§ 18. Courts exercising jurisdiction.

As a rule courts of original and general jurisdiction only may exercise the power to appoint receivers,¹ though in some cases appellate courts have been authorized to exercise such power.² The power to appoint receivers both in this country and in England was originally exercised by the courts of chancery as long as they continued to exist, as such, as distinguished from the common law courts, but since the abolition of the chancery courts, the common law courts, exercising chancery jurisdiction, have succeeded to their powers, the remedy remaining as before peculiarly an equitable remedy, and, except where modified by statute, governed in all respects by the rules and principles of chancery courts.³

The application may be heard in chambers,⁴ or by a judge in

¹*Potter v. Merchants Bank*, 28 N. Y. 641; *Fredenheim v. Rohr*, 87 Va. 764; *Virginia, T. & C. Steel & I. Co. v. Wilder*, 88 Va. 942; *Bitting v. Ten Eyck*, 85 Ind. 357; *Folsom v. Evans*, 5 Minn. 418; *Bank of Mississippi v. Duncan*, 52 Miss. 740; *Scott v. Searles*, 5 Smedes & M. 25; *Second Ward Bank v. Upmann*, 12 Wis. 499. In Illinois, a judge in vacation cannot appoint a receiver. *Hammock v. Farmers' Loan & T. Co.* 105 U. S. 77, 26 L. ed. 1111.

²*State v. Exchange Bank*, 34 Neb. 198; *State v. Commercial State Bank*, 28 Neb. 677; *West v. Weaver*, 8 Heisk. 589; *Kerr v. White*, 7 Baxt. 394, but see *Pacific R. Co. v. Ketchum*, 95 U. S. 1, 24 L. ed. 347; *Ex parte Smith*, 23 Ala. 94.

³The jurisdiction is based on the inadequacy of the courts of ordinary jurisdiction. *Barbour v. National Exchange Bank*, 45 Ohio St. 133.

As to English statute relating to courts, and particularly to appointment of receivers, see Supreme Court of Judicature Act 1873, 36 & 37 Vict. chap. 66, § 25, par. 8. The United States courts continue to exercise chancery jurisdiction and are gov-

erned by the principles and practice, to a large extent, of the English court of chancery. *Payne v. Hook*, 74 U. S. 425, 19 L. ed. 260. See National Banks, Chap. 13.

As to state courts, see Statutes and Codes of Procedure.

The appointment is provisional in its nature and an auxiliary proceeding. *Bufkin v. Boyce*, 104 Ind. 53; *Hottenstein v. Conrad*, 9 Kan. 435; *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 83.

To appoint receivers is an ordinary exercise of appropriate chancery jurisdiction; and to enforce the bond required from a receiver is a matter incidental and ancillary to the appointment, and may appropriately be intrusted to a court of general chancery powers. *Bank of Mississippi v. Duncan*, 52 Miss. 740.

The right to appoint a receiver and to vacate the appointment is referable solely to the power which the courts exercise as courts of chancery. *Folsom v. Evans*, 5 Minn. 418.

⁴*Ex parte Fletcher*, 6 Ves. Jr. 427; *Ex parte Pincke*, 2 Meriv. 452; *Real Estate Associates v. San Francisco*

vacation,' or in open court. Under the earlier practice in this country and in England the matter of appointment was referred to a master in chancery who was directed to hear the application,

Super. Ct. 60 Cal. 228. Not in vacation, however, by a judge, the court not being in session. *Newman v. Hammond*, 46 Ind. 119.

¹*Clark v. Raymond*, 84 Iowa, 257.

Under Miss. Code of 1880, a circuit judge has no power to appoint a receiver in a case pending in the chancery court, either in vacation or in term time. *Alexander v. Manning*, 58 Miss. 634.

Under N. C. Acts 1877, chap. 223, modified by 1879, chap. 68, motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district, or one holding the courts thereof by exchange, at the option of the mover. *Corbin v. Berry*, 88 N. C. 27.

Under the constitution and laws of Florida, a receiver cannot be appointed by the judge of one circuit to take possession of property in another. *State v. Jacksonville & P. M. R. Co.* 15 Fla. 201.

An order appointing a receiver under the N. Y. act of 1848, chap. 26, could be entered by the justice making it, at any term of the court, in the same manner as other orders. *Stewart v. Beebe*, 28 Barb. 34.

In Indiana a judge has no power to appoint a receiver during vacation, nor has a clerk any power to approve a receiver's bond in vacation. *Newman v. Hammond*, 46 Ind. 119.

For a full discussion of the power of courts in vacation see article by Mr. Duwalt in Chicago Legal News, vol. xxviii., p. 414.

Where a receiver was appointed by the chancellor upon a creditor's bill, and several other bills were filed before the vice-chancellor by creditors

of the same debtor, in which suits the receiver in the first suit was made receiver,—held, that the direction as to distribution of the fund belonged to the chancellor. *Burrall v. Leslie*, 6 Paige, 445.

A change of venue carries with it the appointment of a receiver, and the receiver appointed is the receiver of the court to which the case is taken. *Ex parte Haley*, 99 Mo. 150.

A judge in vacation, in Illinois, cannot appoint. *Hammock v. Farmers' Loan & T. Co.* 105 U. S. 77, 26 L. ed. 1111.

A court commissioner has no jurisdiction to appoint a receiver, and a bond given by a receiver so appointed is void. *Quiggley v. Trumbo*, 56 Cal. 626.

Where a master is directed to appoint a receiver, his report of the appointment needs no order of confirmation; and such a report cannot be excepted to. *Re Eagle Iron Works*, 8 Paige, 385.

The words court, judge, and judge in vacation are synonymous. *Pressley v. Lamb*, 105 Ind. 171. But see, *Hammock v. Farmers' Loan & T. Co.* 105 U. S. 77, 26 L. ed. 1111.

The powers of the courts of Indiana in appointing receivers are the same under the code as under the general rule of equity. The power will be exercised for the same purposes, and in the same emergencies. *Bitting v. Ten Eyck*, 85 Ind. 357.

A receiver may be appointed by the judge in vacation under the Texas statute giving the "judge," and not the "court," power to appoint receivers. *New Birmingham Iron & L. Co. v. Blevins* (Tex. Civ. App.) 84 S. W. 828.

and make a recommendation as to the propriety of granting the same as well as the proper persons to be appointed.¹

§ 19. Conflict of jurisdiction.

As a general rule one court will not interfere with the jurisdiction of another court, when the latter has full power to act and do complete justice.² Where two persons on the same day

¹*Re Eagle Iron Works*, 8 Paige, 385; *Wynne v. Lord Newborough*, 15 Ves. Jr. 283; *Tharpe v. Tharpe*, 12 Ves. Jr. 817; *Wilkins v. Williams*, 3 Ves. Jr. 588; *Anon.* 3 Ves. Jr. 515; *Garland v. Garland*, 2 Ves. Jr. 137; *Thomas v. Dawkin*, 1 Ves. Jr. 452; *Creuze v. London*, 2 Prov. C. C. 253. And when the master on due investigation has made his recommendation, the court requires strong ground to interfere therewith. *Re Eagle Iron Works*, ante; *Tharpe v. Tharpe*, ante, and further cases above cited in this note.

²*Union Trust Co. v. Rockford, R. I. & St. L. R. Co.* 6 Biss. 197; *Gaylord v. Fort Wayne, M. & C. R. Co.* 6 Biss. 286; *Conklin v. Butler*, 4 Biss. 22; *Bill v. New Albany & C. R. Co.* 2 Biss. 390; *Beecher v. Bininger*, 7 Blatchf. 170; *Sedgwick v. Menck*, 6 Blatchf. 158; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Watkins v. Pinkney*, 3 Edw. Ch. 533; *Bruce v. Manchester & K. R. Co.* 19 Fed. Rep. 342; *Judd v. Bankers & M. Teleg. Co.* 31 Fed. Rep. 182; *Davis v. Alabama & F. R. Co.* 1 Wood, 661; *Hutchinson v. Green*, 6 Fed. Rep. 833; *Spinning v. Ohio L. Ins. & T. Co.* 2 Disney, 336; *Re Clark*, 4 Ben. 88; *Re Hulst*, 7 Ben. 17; *Liggett v. Glenn*, 4 U. S. App. 438; *Milwaukee & St. P. R. Co. v. Milwaukee & M. R. Co.* 20 Wis. 165. The cases are not uniform, however, some holding that the institution of the suit, and the appointment of a receiver confers jurisdiction, and some holding that these must be followed by actual possession in order to confer exclusive jurisdiction. *East*

Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. 49 Fed. Rep. 608, 15 L. R. A. 109; *Wilmer v. Atlanta & Air Line R. Co.* 2 Woods, 409. The weight of authority, and reason, it would seem, as well, are in favor of the doctrine that when a court has taken cognizance of a controversy, it should, as a matter of right, have jurisdiction for all purposes including the right of possession or control of the res. The contrary doctrine may, and often has, given occasion for criticism of courts for unseemly rivalry and undue haste in obtaining possession of property forming the subject of litigation. The supposed advantage of controlling the receivership sometimes manifested by litigants clearly should cease with the entry of the order of appointment. This, of course, presupposes that the interested parties are properly in court. See also, *Nothard v. Proctor*, L. R. 1 Ch. Div. 4, 45 L. J. Ch. 302; *Bonner v. Hearne*, 75 Tex. 242.

Where, under the provisions of New York Laws 1880, chap. 537, a court of one judicial district has power to remove a receiver appointed in an action pending in another judicial district, it has no power to appoint a successor. For this purpose the proceedings must be remitted to the district in which the action is pending. *Attrill v. Rockaway Beach Improv. Co.* 25 Hun, 376; *McCarthy v. Peake*, 18 How. Pr. 138, and see, *Bill v. New Albany*, 2 Biss. 390; *O'Mahony v. Belmont*, 5 Jones & S. 380; *Young v. Rollins*, 85 N. C. 485.

are appointed receivers it must be determined as a legal right, which is entitled to receive the assets, and the legal right is determined by the priority of judicial action, without regard to the time of verification of the papers, or the time of actually getting possession of the assets,¹ and fractions of a day may be taken into consideration.² The court first acquiring jurisdiction will retain jurisdiction for the purposes of administering the estate.³

¹*People v. Central City Bank*, 53 Barb. 412; *Re Schuyler's Steam Tow Boat Co.* 136 N. Y. 169, 20 L. R. A. 391; *Heidritter v. Elizabeth Oil Cloth Co.* 112 U. S. 294, 28 L. ed. 730; *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.* 6 Biss. 197; *Steele v. Sturges*, 5 Abb. Pr. 442; *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1.

Of two courts of concurrent jurisdiction the one whose jurisdiction first attaches acquires exclusive control of all controversies respecting it, involving substantially the same interests, and the possession of a receiver is the possession of the court appointing him, and cannot be divested by a court of co-ordinate jurisdiction. *Bruce v. Manchester & K. R. Co.* 19 Fed. Rep. 842.

As to conflict of jurisdiction between courts, see *Gest v. New Orleans, St. L. & C. R. Co.* 30 La. Ann. pt. 1, 28; *Jennings v. Philadelphia & R. R. Co.* 23 Fed. Rep. 569; *Osborn v. Heyer*, 2 Paige, 342; *Re Mersey R. Co. L. R.* 37 Ch. Div. 610.

A receiver appointed by a state court, but who has not qualified until after the United States marshal has assumed possession of property is not, as against the marshal, entitled to possession. *Moran v. Sturges*, 154 U. S. 256, 30 L. ed. 981. See also, *Re Swan*, 150 U. S. 637, 37 L. ed. 1202, but, where a receiver of the United States court is appointed over an association, a state court may cancel a mortgage given by such association which has

been paid. *Calhoun v. Lanauz*, 127 U. S. 634, 37 L. ed. 297.

²*East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 49 Fed. Rep. 608, 15 L. R. A. 109; *People v. Central City Bank*, 53 Barb. 412, 35 How. Pr. 42.

³*Thompson v. Holladay*, 15 Or. 348; *Heidritter v. Elizabeth Oil Cloth Co.* 112 U. S. 294, 28 L. ed. 730, but see, *Buchanan v. Smith*, 83 U. S. 16 Wall. 309, 21 L. ed. 287; *Ohio & M. R. Co. v. Fitch*, 20 Ind. 828.

In a case of doubtful authority it has been held that in matters of bankruptcy the federal courts have exclusive jurisdiction, so far as the assets of an insolvent corporation are concerned. *Re Merchants' Ins. Co.* 3 Biss. 162, and see *Buck v. Piedmont & A. L. Ins. Co.* 4 Fed. Rep. 849; *Platt v. Archer*, 9 Blatchf. 559; *Re Binninger*, 7 Blatchf. 262; *Sedgwick v. Place*, 3 Ben. 360.

It has also been held that though a receiver of one court may be in possession of mortgaged property, a foreclosure may be carried on in another court. *Mercantile Trust Co. v. Lamville & V. R. Co.* 16 Blatchf. 324; *Kinney v. Crocker*, 18 Wis. 74; and where there is a serious conflict of authority between state and federal courts, in actions pending in each by antagonistic claimants, and there is serious danger of loss the federal court has appointed a receiver to take possession and sell. *Crane v. McCoy*, 1 Bond, 422.

A receiver appointed by a federal

§ 20. Scope of jurisdiction.

The scope of power given to a chancellor in appointing a receiver varies according to the nature of the proceeding, and will

court, looking to the winding up of a corporation as insolvent, and paying all its creditors, will not be directed to give up possession of the property to a receiver appointed by the state court in a suit by minority stockholders to secure proper representation in the management and the protection of their rights, but such minority stockholders will be allowed to become parties to the proceedings in the federal court. *De La Vergne Refrigerating Mach. Co. v. Palmetto Brew. Co.* (C. C. D. S. C.) 72 Fed. Rep. 579.

A temporary receiver appointed by a federal court in a suit to foreclose a mortgage deed of a corporation will not be ordered to deliver up the property to a receiver previously appointed by a state court, in a suit by simple contract creditors to prevent waste of the corporate property, to which other creditors are not parties, as the two proceedings do not conflict. *State Trust Co. v. National Land I. & Mfg. Co.* (C. C. D. S. C.) 72 Fed. Rep. 575.

A United States court cannot, upon an application for delivery to a receiver appointed by a state court of property in the hands of a receiver of the federal court, review the propriety and validity of the action of the state court in appointing such receiver. *De La Vergne Refrigerating Mach. Co. v. Palmetto Brew. Co.* (C. C. D. S. C.) 72 Fed. Rep. 579.

The United States circuit court may have jurisdiction to appoint a receiver of the property of a corporation which has been dissolved by a state court under a statute providing that such a corporation whose powers have expired shall continue its corporate capacity for two years for the

purpose of collecting debts due it, and conveying and selling its property and effects, where an appeal has been perfected from the judgment of ouster, but such judgment remains in effect and creditors are about to commence suits by which the property will be wasted. *Olmstead v. Distilling & C. F. Co.* (C. C. N. D. Ill.) 73 Fed. Rep. 44.

A Federal court in the state in which a corporation was organized, which has appointed a receiver as ancillary to a receivership of the corporation instituted in another state, has jurisdiction to adjudicate, at the suit of a claimant within the state, the existence and extent of his claim against the corporation, where, as a condition of appointing the receivers, it has required that they appoint a person within the jurisdiction, upon whom service of notices and writs might be made. *New York Security & T. Co. v. Equitable Mortg. Co.* (C. C. W. D. Mo.) 71 Fed. Rep. 556.

A United States circuit court will not decline jurisdiction of a motion to remove receivers of railroad property appointed by it, on the ground that the primary jurisdiction is at the home office of the company, or in another district in which a portion of the railroad lies, where neither of such courts has assumed jurisdiction, and it does not appear that they will do so. *Farmers' Loan & T. Co. v. Northern P. R. Co.* (C. C. D. Wash.) 69 Fed. Rep. 871.

That stock of other corporations has been transferred to the receivers of a railroad company does not vest a federal court of a district other than that of the home office of the company with control of such stock, so far as

be more fully noticed under appropriate chapters relating to receiverships as applied to corporations, partnerships, etc. It may be stated, in general, that the proceeding being remedial in its nature and an incident to the general powers of courts of chancery, the court will be governed by the primary nature of the proceeding and the objects sought to be accomplished thereby, taking into consideration the general principles of equity as administered by courts of chancery or courts of chancery jurisdiction, and such modifications, extensions and limitations as may have been made by statutory enactment.¹

§ 21. Who appointed.

In the selection of a person to act as receiver, the court exercises a discretion and such discretion is to be governed by a consideration of the following principles :

(a) The receiver, in certain respects, is an officer of the court, at least occupies a *quasi* official position. His acts are the acts of the court, and his official conduct is supposed to reflect the will of the court or judge who appoints him, and the power with which he is clothed emanates from the court, as a rule, and to it he must strictly account.

(b) While he occupies this important relation to the court he also sustains an important trust relationship to the parties in interest. He must therefore be fully competent to perform the important duties assigned to him;² he must be a person unexceptional to

to require an application for the removal of the receivers to be made to it before application to the court of a third district appointing them after the original appointment. *Farmers' Loan & T. Co. v. Northern P. R. Co.* (C. C. D. Wash.) 69 Fed. Rep. 871.

The Ohio court of common pleas has no jurisdiction of a suit to compel receivers appointed by the superior court to allow a claim. *Schell v. Huseman* (C. P.) 1 Ohio L. D. 120. See also § 17, ¶ c.

¹Under the English judicature act of 1873 § 25, sub § 8, a court did not have jurisdiction to appoint a receiver by way of equitable execution in case where, prior to the act, no court had

jurisdiction, but the circumstances must be such as to have enabled the court of chancery to appoint a receiver before the act. *Harris v. Beauchamp Bros.* [1894] 1 Q. B. 801. As has been seen elsewhere almost every state in the Union, and especially so in code states, has enlarged the power of appointing receivers by statutory enactments, though in many cases it will be found that the statute is simply a re-enactment of a previous power exercised by the courts. See § 4.

²*Simpson v. Ottawa & P. R. Co.* 1 Ont. Ch. Chamb. 99; *Supton v. Stephenson*, 11. Ir. Eq. 484; *Wynne v. Lord Newborough*, 15 Ves. Jr. 288; *Tharpe v. Tharpe*, 12 Ves. Jr. 317; *Taylor v.*

all the parties interested;' indifferent as to all parties.' As a rule, he should not be a creditor nor shareholder nor officer in an action against a corporation,' nor a stockholder or director of an insolvent railroad company;' nor an ex-agent of the defend-

Life Association, 3 Fed. Rep. 465, 13 Fed. Rep. 498.

In making the appointment all private considerations and preferences are not to be considered; "no man and the counsel of no man has a right to complain that he or his particular friend is not appointed a receiver; especially where the assets, as in these bank cases, to be entrusted to his responsibility are counted not by thousands but by hundreds of thousands." *Re Empire City Bank*, 10 How. Pr. 498; *Williamson v. Wilson*, 1 Bland. Ch. 418; *Smith v. New York Consol. Stage Co.* 28 How. Pr. 208; *Re Empire City Bank*, 10 How. Pr. 498, *Perry v. Oriental Hotel Co. L. R.* 5 Ch. App. 420; *Cookes v. Cookes*, 2 De G. J. & S. 526; *Wynne v. Lord Newborough* 15 Ves. Jr. 283.

¹*Simpson v. Ottawa & P. R. Co.* 1 Ch. Chamb. 99; *Brant v. Willoughby*, 17 Grant Ch. (Ont.) 627; *Richards v. Chesapeake & O. R. Co.* 1 Hughes 28; *Wilson v. Pos*, 1 Hog. 322; *Hooper v. Winston*, 24 Ill. 853; *Baker v. Backus*, 32 Ill. 79; *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174; *Kaiser v. Kellar*, 21 Iowa, 95; *Williamson v. Wilson*, 1 Bland. Ch. 418; *Waters v. Carroll*, 9 Yerg. 102; *Corey v. Long*, 43 How. Pr. 497; *Devendorf v. Dickinson*, 21 How. Pr. 275; *Osborn v. Heyer*, 2 Paige, 342; *Brown v. Northrup*, 15 Abb. Pr. N. S. 333; *Curtis v. Leavitt*, 1 Abb. Pr. 274; *Van Rensselaer v. Emery*, 9 How. Pr. 185; *Ellicott v. Warford*, 4 Md. 80.

²*Hunter v. Hunter*, 4 W. W. & A'B. (E) 17; *Bolles v. Duff*, 54 Barb. 215, 37 How. Pr. 162; *Atkins v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep.

161; *Re Northumberland & D. Dist. Bkg. Co.* 2 De G. & J. 508; *Barbour's Ch. Pr. Vol. I.*, p. 686. A court will not appoint an executor or trustee of an estate as receiver over the same property, *Sykes v. Hastings*, 11 Ves. Jr. 363; *Sutton v. Jones*, 15 Ves. Jr. 584; ——— *v. Jolland*, 8 Ves. Jr. 72, unless the circumstances of the case render it necessary so to do. *Newport v. Bury*, 23 Beav. 30; *Sykes v. Hastings, supra*; but see *Bolles v. Duff*, 54 Barb. 215; *Miller v. Jones*, 39 Ill. 54. He should have no personal interest in the property: *Runyon v. Farmers & M. Bank*, 4 N. J. Eq. 480; *Williamson v. Wilson*, 1 Bland. Ch. 418; *Ellicott v. Warford*, 4 Md. 80; but see *Atkins v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 161; *Tripp v. Chard R. Co.* 21 Eng. L. & Eq. 53.

³*Re Northumberland & D. Dist. Bkg. Co.* 2 De G. & J. 508. See *Re Eagle Iron Works*, 8 Paige, 385; *Lupton v. Stephenson*, 11 Ir. Eq. 484; *Chamberlain v. Greenleaf*, 4 Abb. N. C. 92; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.* 45 Fed. Rep. 436; *Ex parte Pinke*, 2 Meriv. 452; must not be partner of plaintiff's solicitor. *Merchants & M. Bank v. Kent*, 43 Mich. 292; nor should trustees or executors be appointed. *Sutton v. Jones*, 15 Ves. Jr. 584; *Anon.* 3 Ves. Jr. 516.

⁴*Atkins v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 161; unless the case is urgent and exceptional, and then only when all the parties consent; nor a party in such action or counsel in the cause; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.* 45 Fed.

ant,¹ nor an accountant in the office of plaintiff's solicitor;² nor a party to an assignment in an action brought to set such assignment aside;³ nor a partner in a proceeding to wind up such partnership;⁴ nor one of plaintiff's attorneys;⁵ nor a master in chancery of court.⁶ It has been held, however, that the fact that he is a party to the suit is not a disqualification.⁷ He must not be a person who by his own acts or position stands in an improper relation to the cause,⁸ nor a stranger to the court if objected to by either party.⁹ A clerk of the court may be appointed, but acts as an individual and not as clerk.¹⁰

Rep. 436; *Middlesex County Freeholders v. State Bank*, 28 N. J. Eq. 166; *McCullough v. Merchants Loan & T. Co.* 29 N. J. Eq. 217; nor should an officer of a corporation or other person intimately connected with its management. *Baker v. Backus*, 32 Ill. 79; *Benneson v. Bill*, 62 Ill. 408; *Atty. Gen. v. Bank of Columbia*, 1 Paige, 511; *Re Eagle Iron Works*, 8 Paige, 835; it was done, however, in *Gibbs v. Greenville & C. R. Co.* 15 S. C. 304, but the propriety of the order does not seem to have been seriously contested, but turned upon the question as to whether the officers were in fact receivers; see also *Buck v. Piedmont & A. L. Ins. Co.* 4 Fed. Rep. 849; *Albany City Bank v. Schermerhorn*, Clarke Ch. 366; in *Re Fifty-four First Mortgage Bonds*, 15 S. C. 304, the president and directors of a railroad company were ordered to continue in possession and management of a road, not as officers of the road, but as officers of the court.

¹*Graham v. Graham*, 2 Vict. Rep. (E) 145.

²*Hunter v. Hunter*, 4 W. W. & A'B (E) 17.

³*Smith v. New York Consol. S. Co.* 18 Abb. Pr. 419, 28 How. Pr. 208.

⁴*Todd v. Miller*, 2 Tenn. Ch. 107, but see *Miller v. Jones*, 39 Ill. 54.

⁵*Re Lloyd*, L. R. 12 Ch. Div. 447; *Garland v. Garland*, 2 Ves. Jr. 137; not, however, if both plaintiff and

defendant's attorneys are appointed. See also *Shannon v. Hanks*, 88 Va. 338; *Watson v. Arundel*, 9 Ir. Eq. 324; *Baker v. Backus*, 32 Ill. 79.

That a temporary receiver is connected with the firm of counsel for complainant in the suit in which he was appointed renders him ineligible for the appointment of permanent receivers. *State Trust Co. v. National Land I. & Mfg. Co.* (C. C. D. S. C.) 72 Fed. Rep. 575.

⁶*Kilgore v. Hair*, 19 S. C. 486; *Ex parte Fletcher*, 6 Ves. Jr. 427; *Stone v. Wishart*, 2 Madd. 63; *Benneson v. Bill*, 62 Ill. 408.

⁷*Downshire v. Tyrrell*, Hayes 354; *Boyle v. Bettins Llantwit Colliery Co.* L. R. 2 Ch. Div. 726; *Hyde v. Warden*, L. R. 1 Exch. Div. 399; *Taylor v. Eekersley*, L. R. 2 Ch. Div. 302; *Robinson v. Taylor*, 42 Fed. Rep. 803; *Re Lloyd*, L. R. 12 Ch. Div. 447; *Hubbard v. Guild*, 1 Duer, 662; *Fenn v. Bolles*, 7 Abb. Pr. 202; *Hanover F. Ins. Co. v. Germania F. Ins. Co.* 33 Hun, 539; *Jeffery v. Smith*, 1 Jac. & W. 298.

⁸*Smith v. New York Consol. Stage Co.* 28 How. Pr. 208; *Williamson v. Wilson*, 1 Bland. Ch. 418. See *Hanover F. Ins. Co. v. Germania F. Ins. Co.* 33 Hun, 539; *Wynne v. Lord Newborough*, 15 Ves. Jr. 288.

⁹*Smith v. New York Consol. Stage Co.* 28 How. Pr. 208.

¹⁰*Kerr v. Brandon*, 84 N. C. 123;

Where the matter of appointment was referred to a master under the English practice his judgment was conclusive unless some substantial proof was given to the contrary,¹ and his action was never disturbed except on special grounds.²

The same person will not be appointed receiver in two cases where the suits are conflicting,³ nor will the court delegate the appointment of an official liquidator.⁴ As a general rule the appointment of a receiver rests in the sound judicial discretion of the court so far as the person selected is concerned, under all the circumstances of the particular case,⁵ but the court will favorably consider the selection of the parties in interest and will invite suggestions and recommendations.⁶

The same rules which apply to the appointment made by a master, are equally applicable to a selection made by the court, and the discretion given to the court in the selection is rarely interfered with.⁷

State, Rogers v. Oborn, 86 N. C. 432; and so when master in chancery is appointed, *Waters v. Carroll*, 9 Yerg. 102; *Hammer v. Kaufman*, 39 Ill. 87.

¹*Garland v. Garland*, 2 Ves. Jr. 137; *Creuze v. London*, 2 Bro. C. C. 253; *Thomas v. Dawkin*, 1 Ves. Jr. 452; *Anon.* 3 Ves. Jr. 515; *Wilkins v. Williams*, 3 Ves. Jr. 588; see *Wynne v. Lord Newborough*, 15 Ves. Jr. 283; *Hughes v. Williams*, 6 Ves. Jr. 453; *Tharpe v. Tharpe*, 12 Ves. Jr. 317.

Inasmuch as the appointment is peculiarly within the judicial discretion of the court appointing, it is rarely that the appellate court will interfere with the selection made. *Cookes v. Cookes*, 2 De G. J. & S. 526; but see *Perry v. Oriental Hotel Co.* L. R. 5 Ch. App. 420; *Gardiner v. Howell*, 60 Ga. 11; *Gunby v. Thompson*, 56 Ga. 316; *Crawford v. Spurling*, 56 Ga. 611; *Robinson v. Ross*, 40 Ga. 375; *Cohen v. Meyers*, 42 Ga. 46; *Reid v. Reid*, 38 Ga.

24; *Re Eagle Iron Works*, 8 Paige, 385.

²*Tharpe v. Tharpe*, 12 Ves. Jr. 320; *Bowersbank v. Collosseau*, 3 Ves. Jr. 164; *Creuze v. London*, 2 Bro. C. C. 256; *Garland v. Garland*, 2 Ves. Jr. 137; *Anon.* 3 Ves. Jr. 515; *Wilkins v. Williams*, 3 Ves. Jr. 588; *Thomas v. Dawkin*, 3 Bro. C. C. 508; *Re Eagle Iron Works*, 8 Paige, 385.

³*Re City, &c. Ins. Co.* 25 W. R. 342.

⁴*Re City, &c., Ins. Co.* 25 W. R. 342.

⁵*Smith v. New York Consol. Stage Co.* 28 How. Pr. 208; *Williamson v. Wilson*, 1 Bland. Ch. 418; *Perry v. Oriental Hotels Co.* L. R. 5 Ch. App. 420; *Cookes v. Cookes*, 2 De G. J. & S. 526.

⁶*Watkins v. Worthington*, 2 Bland, Ch. 609; *Hanover F. Ins. Co. v. Germania F. Ins. Co.* 33 Hun, 539.

⁷*Cookes v. Cookes*, 2 De G. J. & S. 526; *Perry v. Oriental Hotels Co.* L. R. 5 Ch. App. 420; *Williamson v. Wilson*, 1 Bland, Ch. 418; *Shannon v. Hanks*, 88 Va. 338.

§ 22. Form and scope of order.

The form of the order, and its scope, must of necessity be shaped with reference to the facts and circumstances of each particular case which renders it impossible to give minute directions in regard thereto. A few general rules and principles applicable to this subject will only be attempted in this connection.

(a) The order should specifically describe the property over which the receiver is to have custody and control if the property is of such nature as to warrant such a description.¹ And when a receivership has been placed over specified property it may be enlarged upon the discovery of other property over which the receiver should have custody.²

(b) The primary object in the appointment of a receiver being the preservation of the property *pendente lite*, it follows that the power of the court in making the order, embraces all acts necessary to preserve the property and give it additional value.³ "A

¹The order appointing a receiver "of the incomes of the outstanding trust property in the pleadings mentioned" was held to be insufficient. It should state on the face of it over what property the receiver is appointed that a party may know what it is that the officer of the court is in possession of. *Crow v. Wood*, 18 Beav. 271. "Money deposited or lately on deposit in the hands of the defendants, Belmont and Lucke, to the credit of the defendant, John O'Mahoney," is not sufficient. *O'Mahoney v. Belmont*, 62 N. Y. 183. It is sufficiently specific where it describes the property as "the books, notes and accounts of all kinds of the said defendant in the business of selling cigars, snuff, tobacco and other goods." *Martin v. Burgwyn*, 88 Ga. 78. As to form of order of railroad receiver in relation to keeping accounts, see *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 41 Fed. Rep. 8.

²*Lynes v. Lockwood*, 2 Moll. 498. Sometimes there is no separate order

appointing a receiver but the appointment is embodied in the final decree. *Shulte v. Hoffman*, 18 Tex. 578; *Bowman v. Bell*, 14 Sim. 392. Sometimes the appointment is interlocutory, and at other times it is after final decree, as in *Haas v. Chicago Bldg. Soc.* 89 Ill. 498; *Bowman v. Bell*, 14 Sim. 392; *Wright v. Vernon*, 8 Drew. 112; *Thomas v. Davies*, 11 Beav. 29; *Hyman v. Kelly*, 1 Nev. 179; *Astor v. Turner*, 11 Paige, 436; *Howell v. Ripley*, 10 Paige, 43; *Brinkman v. Ritzinger*, 82 Ind. 358; *Connelly v. Dickson*, 76 Ind. 440; *Travelers' Ins. Co. v. Brouse*, 83 Ind. 62; *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510; *Merrill v. Elam*, 2 Tenn. Ch. 513, but in all cases whenever the appointment may be made the order should specifically define the duties of the receiver.

³*Gilbert v. Washington City, S. M. & G. S. R. Co.* 33 Gratt. 586. "A court of equity having in charge the mortgaged property of a railroad company is authorized to do all acts that may be necessary within its corporate powers to preserve the property and to

court of equity in all cases delights to do complete justice and not by halves," is a maxim in equity jurisprudence.¹

(c) The power to appoint embraces all necessary orders as to the custody of the property whether in the immediate possession of the defendant, or his agent, and in proper cases can also order the defendant's agents and employees, although not parties to the record, to deliver specific property to the receiver.²

(d) The court, however, will exercise great caution in framing its orders respecting property in the hands of persons not parties to the suit, or parties who are in possession under a *prima facie* title.³ Courts of equity, except in extreme cases, are averse to appointing receivers in cases where the contest grows out of a ques-

give to it additional value, not only for the benefit of the lien creditors but also for the benefit of the company, whose possession the court has displaced by the appointment of a receiver, and by taking into its own hands the property, rights, works and franchises of the company. Any act, it would seem, necessary for the protection and preservation of the property is a legitimate and proper act, and whatever is manifestly appropriate to such preservation and protection or to the enhancement of the value of the property, not in excess of the powers of the corporation will always be upheld and enforced by the courts." See also *Jerome v. McCarter*, 94 U. S. 784, 24 L. ed. 136.

¹*Knight v. Knight*, 3 P. Wms. 331; *Corbet v. Johnson*, 1 Brock. 77; *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 31 L. ed. 309.

²*Re Cohen*, 5 Cal. 594. In this case an order was entered for a rule on certain persons not parties to the suit to show cause why they should not be attached for contempt in disobeying the order for delivery. They appeared in answer to the rule. *Held*, the appearance and answer gave the court full jurisdiction over persons as well as subject-matter.

While the court has ample power to adjust the rights of all parties, yet the order of appointment should not direct the manner of distribution in advance of a final decree. *West v. Chasten*, 12 Fla. 315.

³*Frank v. Stapler*, 83 Ga. 429; *Pelzer v. Hughes*, 27 S. C. 409. In this case it appeared that a party was in possession and had *prima facie* title, and the court refused to punish for contempt for refusal to deliver. In a similar case, *Lloyd v. Passingham*, 16 Ves. Jr. 69, Lord Eldon said: "The court must not only be satisfied of the existence of the fraud, but be morally sure upon the hearing of the cause the party would be turned out of possession." "Again, upon the question of title, a very important distinction exists between cases where different and hostile equitable interests are involved, and where one party has the legal title unquestionably in him, and particularly where with such title he is in possession." Hoffman's Prov. Remedies, § 244. In this class of cases relating to possession under claim of title there must appear danger of loss or material injury if possession is permitted to remain in the holder. See Pom. Eq. Jur. Vol. III, § 1884, and cases cited.

tion of title for the reason that common law courts are the proper forums for adjudicating such matters.

(e) The order of appointment relates back to the date of granting, though it may not be complete until the bond is given. After the granting of the order the subject-matter, or property, over which the receivership extends is *in custodia legis* and not subject to interference with or levy by execution or attachment.¹ The receiver rarely takes possession, however, until he has qualified by giving bond with surety as required. The order of appointment continues during the pendency of the suit, unless otherwise limited or modified.²

(f) No formal order of assignment is necessary to pass the title of the defendant to a receiver.³ The appointment vests in him the title to the property except such as is exempt from levy and

¹When an order is made for the appointment of a receiver of particular property it amounts to a sequestration by act and operation of laws of such property, and when the receiver is subsequently appointed the title to such property vests by relation from the date of the order to the same effect as if such receiver was named in the order. *Van Alstyne v. Cook*, 25 N. Y. 489; *Rutter v. Tullis*, 5 Sandf. 610; *Porter v. Williams*, 9 N. Y. 142; *Fairfield v. Weston*, 2 Sim. & Stu. 46; *Smith v. New York Consol. Stage Co.* 18 Abb. Pr. 419; *Deming v. New York Marble Co.* 12 Abb. Pr. 66; *Storm v. Waddell*, 2 Sandf. Ch. 544; *Wilson v. Allen*, 6 Barb. 542; *Re Berry*, 26 Barb. 65; *Re Christian Jensen Co.* 128 N. Y. 550; *Re Schuyler Steam Tow Boat Co.* 136 N. Y. 169, 20 L. R. A. 891; *Maynard v. Bond*, 67 Mo. 315; *Regenstein v. Pearlstein*, 80 S. C. 192; *Olinkcales v. Pendleton Mfg. Co.* 9 S. C. 318; *Ex parte Evans*, L. R. 18 Ch. Div. 252.

The order appointing a receiver is in reality an equitable execution and relates to the date thereof though it is not perfected by giving of bond until afterwards. *Ex parte Evans* in *Re*

Watkins, L. R. 15 Ch. Div. 252; *Hatton v. Haywood*, L. R. 9 Ch. 229; *Anglo-Italian Bank v. Davies*, L. R. 9 Ch. Div. 275. And see *Contra: Edwards v. Edwards*, L. R. 2 Ch. Div. 291; *DeFries v. Creed*, 34 L. J. Eq. N. S. 607; *Woods v. Ellis*, 85 Va. 471.

²*Weems v. Lathrop*, 42 Tex. 207; *Williamson v. Wilson*, 1 Bland, Ch. 418.

³"Sales whether made on seizure under execution issued after judgment, or on seizure before final judgment on decretal orders which a court has power to make are held to pass title to the property sold, not because the ministerial officer has title but because the law casts upon him, when acting under its authority, the power to make a sale which will bind the owner as fully as would his own act." *Russell v. Texas & P. R. Co.* 68 Tex. 646.

The same rule has been the law in New York before and since the adoption of the code. *Mann v. Pents*, 2 Sandf. Ch. 257; *Storm v. Waddell*, 2 Sandf. Ch. 505; *Wilson v. Allen*, 6 Barb. 542; *Cooney v. Cooney*, 65 Barb. 524. And this rule applies to real estate. *Porter v. Williams*, 9 N. Y.

sale.¹ The conflict that has been engendered by the courts upon this question has arisen from a misconception of the meaning of the word title as applied to a receiver as elsewhere explained.²

(g) It is proper and is the duty of a chancellor to modify the order if its application is found to operate harshly.³ The recitals in an order are *prima facie* true, but are not conclusive, and may be contradicted.⁴ Prior to a hearing it is error in the court to order payment of the proceeds to certain specified creditors. The order should be to hold the proceeds to await the result of the litigation.⁵

(h) The regularity of the appointment cannot be attacked in a collateral proceeding, but must be impeached, if at all, in a direct proceeding for that purpose.⁶ This doctrine is founded upon

142. And see § 17, ¶ b, note; *Iddings v. Bruen*, 4 Sandf. Ch. 252. The court has power to compel an assignment. *Chipman v. Sabbaton*, 7 Paige, 47; *Porter v. Williams*, 5 How. Pr. 441; *Fessenden v. Woods*, 8 Bosw. 550; *People, Williams, v. Hulburt*, 5 How. Pr. 446. See *Moak v. Coats*, 33 Barb. 498; *Scott v. Elmore*, 10 Hun, 68.

¹*Hudson v. Plets*, 11 Paige, 180; *Andrews v. Rowan*, 28 How. Pr. 126; *Tylotson v. Wolcott*, 48 N. Y. 188; *Cooney v. Cooney*, 65 Barb. 524; *Finnin v. Malloy*, 1 Jones & S. 882; *Sands v. Roberts*, 8 Abb. Pr. 843.

²See § 57.

³*Graham v. Fuller Electrical Co.* 75 Ga. 878; *Kron v. Smith*, 96 N. C. 386.

An order appointing a receiver of a corporation will not be vacated because he resides in another state and is not required to give bond within the jurisdiction. *Aiken v. Colorado River I. Co.* (C. C. S. D. Cal.) 72 Fed. Rep. 591.

⁴*Pressley v. Lamb*, 105 Ind. 171.

⁵*Nussbaum v. Price*, 80 Ga. 205.

On motion to appoint a receiver, an order that the president and directors of the Greenville & Columbia R. Co., "continue in possession and management of the property under the order

of and subject to this court, and that they make report to the court at such times as it may require,"—*Held*, to constitute them receivers. *Gibbes v. Greenville & C. R. Co.* 15 S. C. 304, 518.

⁶In a suit by the receiver in relation to matters connected with his trust the order of appointment will be conclusive. *Neeves v. Boos*, 86 Wis. 318; *Vermont & C. R. Co. v. Vermont C. R. Co.* 46 Vt. 792; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Stanley v. National U. Bank*, 115 N. Y. 122; *Block v. Estes*, 93 Mo. 318; *Cox v. Volkert*, 86 Mo. 505; *Keokuk N. L. Packet Co. v. Davidson*, 13 Mo. App. 561; *Richards v. People*, 81 Ill. 551; *Commercial Nat. Bank v. Burch*, 141 Ill. 519; *Barbour v. National Exch. Bank*, 45 Ohio St. 138; *Beverley v. Brooks*, 4 Gratt. 187; *Neill v. Hill*, 16 Cal. 145. It cannot be attacked in a matter relating to the compensation of the receiver; nor by a creditor who accepts a dividend from the receiver, *Greeley v. Provident Sav. Bank*, 103 Mo. 212; nor by one consenting to the appointment. *Russell v. White*, 63 Mich. 409. Nor, in the absence of fraud or mistake, can a purchaser of the receiver deny the valid-

general equitable principles, but it is not applicable to a case

ity of his appointment. *Stilzer v. La Rose*, 79 Ind. 435. See generally *Lowenstein v. Finney*, 54 Ark. 124; *Florence Gas, Elec. L. & P. Co. v. Hanby*, 101 Ala. 15; *Comer v. Bray*, 88 Ala. 217; *Moore v. Taylor*, 40 Hun, 56; *Case v. Marchand*, 28 La. Ann. 60; *Eldrington v. Pridham*, 65 Tex. 612; *Texas, etc. R. Co. v. Gay*, 86 Tex. 571, 25 L. R. A. 52; *Wilson v. Barney*, 5 Hun, 257.

The possession of a receiver appointed by the court is the possession of the court; and the right of the court to grant the receivership cannot be questioned in proceedings for contempt by disturbing such possession. *Albany City Bank v. Schermerhorn*, 9 Paige, 372.

The proper record evidence of an appointment as receiver is conclusive evidence of the right to act as such, until it is impeached. It is immaterial whether the order of appointment was erroneous or improper; while it is a subsisting order the receiver will be sustained in his possession of property. *Vermont & C. R. Co. v. Vermont C. R. Co.* 46 Vt. 792; *Pressley v. Lamb*, 105 Ind. 208; *Bodkin v. Merit*, 102 Ind. 298; *First Nat. Bank v. United States Encaustic Tile Co.* 105 Ind. 227; *Thompson v. Holladay*, 15 Or. 34; *Dann Mfg. Co. v. Parkhurst*, 125 Ind. 317; *Greenawalt v. Wilson*, 52 Kan. 109; *Radebaugh v. Tacoma & P. R. Co.* 8 Wash. 670; *Elderkin v. Peterson*, 8 Wash. 674.

The appointment of a receiver cannot be collaterally attacked in an action by the receiver to recover an assessment, where the court appointing him had jurisdiction of the subject matter and of the parties. *Rand, McN. & Co. v. Mutual F. I. Co.* 58 Ill. App. 528.

A party to a proceeding for the appointment of a receiver, who contests the application and fails to appeal from the order of appointment, cannot afterwards assert a claim based on the irregularity or wrongfulness of the appointment. *Saunders v. Kemper* (Tex. Civ. App.) 32 S. W. 585.

A judgment appointing a receiver in purely statutory proceedings in which such appointment is not authorized is void, and may be collaterally assailed. *Murray v. American Surety Co.* (C. C. App. 9th C.) 70 Fed. Rep. 841.

An insurance company does not have such an interest in an assignment by a corporation, by reason of a suit against it on a policy by a receiver to whom the assignee was directed to deliver all the property of the corporation, as will authorize it to intervene in the receivership proceedings for the purpose of having the appointment of the receiver and all proceedings taken by him set aside. *Barth v. American Ins. Co.* (Wis.) 65 N. W. 1035.

A levying creditor cannot intervene to attack the appointment of a receiver on the ground of want of jurisdiction. *Holmes v. Knapp Electrical Works*, 59 Ill. App. 58.

If the court had jurisdiction of the subject-matter the validity of the appointment cannot be questioned in an action by the receiver. *Davis v. Shvarer*, 90 Wis. 250.

An erroneous appointment on an inadequate showing will not affect the jurisdiction of the court over the subject-matter. *Id.*

Appointment cannot be attacked in a collateral proceeding. *State v. Scarritt*, 80 S. W. Rep. 1026. See *State v. Ross*, 122 Mo. 435; *Yore v. Superior*

where the appointment is void for want of jurisdiction over the defendant.¹

(i) Nor is the appointment invalidated by irregularity or error in the proceeding.²

Court, 41 Pac. Rep. 477; *Smith v. Hopkins*, 10 Wash. 77.

A judgment creditor not a party by intervention or otherwise cannot appear in the action without leave and move to vacate the order of appointment. *Wooding v. Wooding*, 10 Wash. 581.

¹ *Texas & P. R. Co. v. Gay*, 86 Tex. 571, 25 L. R. A. 53; *St. Louis & S. Coal & Min. Co. v. Sandoval Coal & Min. Co.* 111 Ill. 83.

The appointment of a receiver by a void order does not disqualify him from being appointed under a second order, under Ind. Rev. Stat. 1894, § 1237, providing that no party, attorney, or "other person interested" in any action shall be appointed receiver therein. *Robinson v. Dickey* (Ind.) 42 N. E. 688.

The appointment of a receiver of a dissolved corporation without notice to it is void where the appointment is made without requiring the complainant to give bond, in violation of Ala. Acts. 1894-95, p. 226, although such corporation may have been in contempt in joining in a request in another court for the appointment of a receiver. *Capital City Water Co. v. Weatherly* (Ala.) 18 So. 841.

Goods taken by a receiver under an appointment which is void need not be restored before hearing another application for the appointment of a receiver, as void appointments may be entirely disregarded and a second appointment made without vacating the first. *Robinson v. Dickey* (Ind.) 42 N. E. 688.

An appointment of a receiver upon

the application of plaintiff is not invalid because of the erroneous overruling of a previous motion by defendant to require plaintiff as a non-resident to file a bond for costs under Ind. Rev. Stat. 1894, § 598. *Galloway v. Campbell* (Ind.) 41 N. E. 597.

² As where one of the firm is not made a party to the proceeding, it not appearing that he was within the jurisdiction of the court, or had a substantial interest in the partnership. *Stelzer v. La Rose*, 79 Ind. 485. Or where the court fails to require adequate security. *Nesbitt v. Turrentine*, 83 N. C. 585. Nor does the fact that an execution was not sued out and returned *nulla bona*, in a creditor's proceeding, where no objection was interposed at the time of the appointment, and where according to the facts and admissions it would have been an idle ceremony and of no benefit. *Sage v. Memphis & L. R. Co.* 125 U. S. 361, 31 L. ed. 694. Nor where the clerk of court is appointed in violation of the statute. *Moore v. Taylor*, 40 Hun, 56. Nor the failure to give notice as required by law. *Corbin v. Berry*, 83 N. C. 27. Nor where the findings of the court are not reduced to writing until three or four days after the entry of the order. *Forsyth Mash. Co. v. Hope Mills L. Co.* 109 N. C. 576. Nor where the order did not specify the newspapers in which it was to be published, as required by the code. *Re Christian Jensen Co.* 128 N. Y. 550. Nor by reason of defects in the averments of the bill. *Comer v. Bray*, 83 Ala. 217. See also *Stith v. Jones*, 101 N. C. 360.

(j) The order of the court appointing a receiver is subject to revocation and will be revoked under certain circumstances, when the application is made in apt time:

(1) Where the appointment was a nullity, as where the order was *ex parte* and without notice, the insolvency of the corporation defendant not being alleged.¹

(2) Where the court in making the appointment was imposed upon, the application being collusive as between the plaintiff and defendant.²

(3) Where it appears that the appointment was an invasion of defendant's rights; that the facts did not justify an appointment and the same was unadvisedly and improvidently made.³

(4) When it appears that the court appointing had no jurisdiction of the action.⁴

(5) Delay in making application for the vacation of an order appointing a receiver, will be fatal to the application. It must be made in apt time.⁵ And so where the applicant has participated in the proceedings pending in which the receiver is appointed.⁶

Nor where the receiver neglects to be sworn, as required by statute. *American Bank v. Cooper*, 54 Me. 438.

¹ *Turgeon v. Brady*, 24 La. Ann. 348.

² *Sage v. Memphis & L. R. Co.* 125 U. S. 361, 31 L. ed. 694; *State v. Phenix Bank*, 88 N. Y. 9; *Wilson v. Barney*, 5 Hun, 257.

³ *Allen v. Dallas & W. R. Co.* 3 Woods, 316.

⁴ *Mercantile Trust Co. v. Aena Iron Works*, 4 Ohio C. C. 579.

⁵ *Palen v. Bushnell*, 13 N. Y. Supp. 785.

⁶ *Battershall v. Davis*, 81 Barb. 323. In this case a stockholder having joined in an application made to the court by the receiver to sell the assets of the corporation, cannot be permitted to question the validity of the receiver's appointment.

The revocation of the order appointing a receiver is, as a rule, in the discretion of the court, and should be

granted if the circumstances demand it.

Where a writ of error is sued out on a judgment for complainant under a bill alleging fraudulent transfers of defendant's property and a supersedeas bond is filed securing complainant, a motion to vacate an order appointing a receiver should be granted. *Louisville & St. L. R. Co. v. Southworth*, 88 Ill. App. 225.

Cases may arise in which it would be the duty of the court, on dismissing a bill, to retain the custody of the property and funds in controversy, and to continue the receivership, or even to transfer the receivership to another suit, then pending in the court, between the same parties, and involving their rights and equities in and to the same property; but such transfer could never be ordered unless the second suit presented a state of facts which would have authorized

(k) In many of the states an order appointing a receiver can be appealed from.¹ This is based upon the ground that in its effect the order is final, or at least affects a substantial interest. And frequently the statute authorizes an appeal from an order of this nature.²

the appointment of a receiver in the first instance. *Scott v. Ware*, 65 Ala. 174.

Where a receiver is appointed in advance of probate to take rents and profits pending litigation upon a *caveat* to the probate in the prerogative court, and in ejectment by the heirs at law against the devisees in a proper court of law, and afterwards a judgment was rendered against the devisees, the receiver will be recalled. *Baptist Church v. Hetfield*, 46 N. J. Eq. 502.

The rescission of an order appointing a receiver, "without prejudice to anyone, party or claimant," has been held to be no defense to a possessory warrant for an engine previously sued out against him. He would have surrendered it to the company at his own risk. *Peacock v. Pittsburg L. & O. Works*, 52 Ga. 417.

Where the appointment of a receiver has been properly vacated by the order of a judge at chambers, the validity of such order does not depend on the mere discretion of the court or judge making the appointment. And where the court, without any new showing or change of circumstances calling for judicial action, directs the order to be set aside as a nullity, it assumes authority not warranted by law. *Cincinnati, S. & O. R. Co. v. Sloan*, 31 Ohio St. 1.

A party at whose instance a receiver has been improperly appointed, but on a correct statement of facts, will be charged with the cost of the receivership, and with such rents as the receiver himself would be properly

chargeable with. *Lockhart v. Gee*, 8 Tenn. Ch. 332.

It is not necessary to notify the receiver of a motion to revoke the order of appointment. He is entitled to notice only where it is sought to make him liable, or to account, or to make return. *Howard v. Lowell Mach. Co.* 75 Ga. 325.

The appointment of a permanent receiver by final judgment, under N. Y. Code Civ. Proc. § 713, supersedes the previous appointment of a temporary receiver by the same court in another district; and an injunction restraining the permanent receiver from interfering with the temporary is erroneous. *Glines v. Binghamton Trust Co.* 68 Hun. 511.

¹ *Wilson v. Davis*, 1 Mont. 98; *Callanan v. Shaw*, 19 Iowa, 188; *Pressley v. Lamb*, 105 Ind. 171 (see stat.); *Cone v. Paute*, 11 Heisk. 506; *McMinneville & M. R. Co. v. Huggins*, 7 Coldw. 217; *Mabry v. Ross*, 1 Heisk. 769; *Lewis v. Campau*, 14 Mich. 458; *Barry v. Briggs*, 22 Mich. 201; *Detroit First Nat. Bank v. Barnum Wire & I. Works*, 58 Mich. 315; *Brown v. Ring*, 77 Mich. 159; *Dollard v. Taylor*, 1 Jones & S. 496; *Fellows v. Heermans*, 13 Abb. Pr. N. S. 1; *Grant v. Webb*, 21 Minn. 89; *Knight v. Nash*, 23 Minn. 452; *McCord v. Weil*, 33 Neb. 868, 29 Neb. 682; *Hovey v. McDonald*, 109 U. S. 150, 27 L. ed. 888.

² *Dale v. Kent*, 58 Ind. 584; *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510; *Shannon v. Hanks*, 88 Va. 338; *Smith v. Butcher*, 28 Gratt. 144; *Ruffner v. Mairs*, 33 W. Va. 655.

In other states, not being a final order, it is not appealable.¹ And so also where the evidence is conflicting.² But an order based on a motion to vacate the order appointing a receiver is not subject to appeal, or writ of error.³ And where the order appealed from is in the discretion of the court granting it, it is not subject to review unless the court has abused its discretion.⁴

¹Under act of March 3, 1891, 26 Stat. 826, chap. 517, § 6, the United States Court of Appeals will not review an order for the appointment of a receiver. *Florida Constr. Co. v. Young*, 11 U. S. App. 688. The rule is the same under the acts of Congress regarding appeals to the Supreme Court of the United States. *Grant v. Phoenix Mut. L. Ins. Co.* 106 U. S. 429, 27 L. ed. 257. The requirement is that the order from which the appeal is desired must terminate the litigation of the parties on the merits of the case, so that if there should be an affirmance in the upper court, the court below would have nothing to do but to execute the decree it had already rendered. *Id.* See also, *Whiting v. Bank of U. S.* 38 U. S. 13 Pet. 6, 10 L. ed. 33; *Forgay v. Conrad*, 47 U. S. 6 How. 201, 12 L. ed. 404; *Craighead v. Wilson*, 59 U. S. 18 How. 199, 15 L. ed. 332; *Beebe v. Russell*, 60 U. S. 19 How. 283, 15 L. ed. 668; *Bronson v. La Crosse & M. R. Co.* 67 U. S. 2 Black, 524, 17 L. ed. 359; *Thomson v. Dean*, 74 U. S. 7 Wall. 342, 19 L. ed. 97; *St. Clair County v. Lovingslon*, 85 U. S. 18 Wall. 628, 21 L. ed. 818; *Parcels v. Johnson*, 87 U. S. 20 Wall. 658, 22 L. ed. 410; *North Carolina R. Co. v. Swasey*, 90 U. S. 23 Wall. 405, 23 L. ed. 186; *Crosby v. Buchanan*, 90 U. S. 23 Wall. 420, 23 L. ed. 188; *Tipppecanoe County Comrs. v. Lucas*, 93 U. S. 108, 23 L. ed. 822; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73; *Wilson v. Davis*, 1 Mont. 98; *Em-*

mett v. Garnett, 7 Mackey, 52; *Meadow Valley Min. Co. v. Dodds*, 6 Nev. 261; *Eaton & H. R. Co. v. Varnum*, 10 Ohio St. 622; *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 1; *Holden, &c. v. McMakin*, 1 Par. Sel. Eq. Cas. 270; *Wood v. Brewer*, 9 Ind. 86; *Coates v. Cunningham*, 80 Ill. 467; *Kansas Rolling Mill. Co. v. Atchison, T. & S. F. R. Co.* 31 Kan. 90; *Boyd v. Cook*, 40 Kan. 675; *Hottenstein v. Conrad*, 5 Kan. 249; *Hanon v. Weil*, 69 Miss. 476; *Duncan v. Campau*, 15 Mich. 415; *East & West Texas L. Co. v. Williams*, 71 Tex. 444.

²*Naylor v. Sidener*, 106 Ind. 179; *Journey v. Brown*, 20 N. J. L. 111; *Roberson v. Ross*, 40 Ga. 375; *Cohen v. Meyers*, 42 Ga. 46.

³*Coates v. Cunningham*, 80 Ill. 467; *Farson v. Gorham*, 117 Ill. 137 (see statute); *Hull v. Caughy*, 66 Md. 104.

⁴*Neeves v. Boos*, 86 Wis. 318; *Fellows v. Heermans*, 13 Abb. Pr. N. S. 1; *Nimocks v. Cape Fear Shingle Co.* 110 N. C. 230; *Gardner v. Howell*, 60 Ga. 11; *Crawford v. Spurling*, 56 Ga. 611; *Gunby v. Thompson*, 56 Ga. 316; *Reid v. Reid*, 38 Ga. 24; *Baird v. Cumberland & S. R. Turnp. Co.* 1 Lea, 394; *Bramley v. Tyree*, 1 Lea, 581; *Johnston v. Hanner*, 2 Lea, 8; *Roberson v. Roberson*, 3 Lea, 50; *La Société Française D'epergenes v. 15th Judicial Dist. Ct.* 53 Cal. 495; *Emerie v. Alvarada*, 64 Cal. 529; *Journey v. Brown*, 20 N. J. L. 111; *Brown v. Vandermuellen*, 41 Mich. 418; *Beecher*

(1) The effect of an appeal taken from an order appointing a receiver has given rise to numerous conflicting decisions. It may, however, be stated as reasonably clear from the weight of authority:

(1) That after an appeal and before the receiver has taken possession the property is unaffected by the order.¹

(2) When an appeal has been taken from an order appointing a receiver *pendente lite* the power of the court making the order and its officers is suspended in reference to the order appealed from, and the order remains inoperative pending the appeal.² On

v. *Marquette & P. Rolling Mill Co.* 40 Mich. 307.

¹*Cook v. Cole*, 55 Iowa, 70.

The court cannot, in anticipation of a judgment, make an order continuing a receivership after judgment, during the pendency of appeal, which may be taken. Thus, an order entered subsequent to the order of appointment, continued the receivership "for thirty days after the entry of judgment in the action, and if an appeal shall be taken until thirty days after the decision of the appeal by the General Term, and in like manner until after the decision of any appeal which might be taken," *Held*, unauthorized. *Colwell v. Garfield Nat. Bank*, 119 N. Y. 408 (see code).

²*State v. Johnson*, 13 Fla. 33; *Allen v. Chadburn*, 3 Baxt. 225; *Chicago & S. R. Co. v. Cason*, 183 Ind. 49; *Supreme Sitting of O. of I. H. v. Baker*, 184 Ind. 298, 20 L. R. A. 210; *State v. Johnson*, 13 Fla. 33.

When an appeal is taken from an order appointing a receiver and a supersedeas bond given as required by law the power of the receiver is suspended, and the property must be restored. *Farmers' Nat. Bank, etc. v. Backus*, 2 Am. & Eng. Corp. Cas. N. S. 397.

When an appeal with supersedeas is taken from an interlocutory order

that part of the case which is appealed is completely removed from the jurisdiction of the lower court. *Farmers' N. B. etc. v. Backus*, 1 Am. & Eng. Corp. Cas. N. S. 397.

An appeal from an order appointing operates as a stay upon all proceedings under the order. *Virginia T. & C. Steel & Iron Co. v. Wilder*, 88 Va. 942.

Taking an appeal from an order appointing a receiver *pendente lite*, and filing a supersedeas bond in accordance with Minn. Gen. Stat. 1894, § 6142, providing that the effect of the appeal with such bond is to "stay all proceedings" on the order and "save all rights affected thereby," suspend the power of the receiver and render the order inoperative pending the appeal, making it the duty of the receiver to restore the possession of any property he may have taken under the order. *Farmers' Nat. Bank v. Backus* (Minn.) 65 N. W. 255.

A receiver of an insolvent corporation cannot appeal from a decree distributing the assets, as he is not injured thereby. *Chicago Title & T. Co. v. Caldwell*, 58 Ill. App. 219.

An order affirming an interlocutory decree of a lower court is only an adjudication by the appellate court that the action of the court below was not erroneous. The jurisdiction of the

the contrary, where the order appealed from is an order of adjudication in an insolvency proceeding in which a receiver was appointed it was held that the functions of the receiver were not suspended.¹ There is not entire harmony in the cases as to the effect of an appeal in regard to a receivership, but it would seem, however, that in all cases when the order appointing a receiver is appealable, and an appeal is taken, that the receivership is suspended pending the appeal; and that when the order appointing is only interlocutory, and the appeal is from the final decree, the receivership is not suspended, and especially so if the receiver is a *pendente lite* receiver simply.

§ 23. Bond.

(a) Except in a few cases it is a necessary incident and a requirement that the receiver shall give bond, or recognizance, with sureties to be approved by the court or master, as the statute or practice may require, in such amount as shall appear requisite to amply secure all persons whose interests are involved.² The appointment is not perfected until the person selected has filed the

court below reverts after the suspension caused by the appeal. *San Antonio, etc. G. S. R. Co. v. Davis*, 2 Am. & Eng. Corp. Cas. N. S. 374.

¹*Re Real Estate Associates*, 58 Cal. 356; *Coburn v. Ames*, 52 Cal. 885; *Von Boun v. San Francisco Super. Ct.* 58 Cal. 358; *Swing v. Townsend*, 24 Ohio St. 1; *Brien v. Paul*, 3 Tenn. Ch. 357; *Schenk v. Peay*, 1 Dill. 267; *Smith v. Allen*, 2 E. D. Smith, 259; *Stafford v. Union Bank*, 57 U. S. 16 How. 135, 14 L. ed. 376. And in *Hovey v. McDonald*, 109 U. S. 150, 27 L. ed. 388, where an appeal was taken from an order appointing a receiver, and a supersedeas filed the property did not pass into the custody of the law until the receiver actually took possession after the affirmance of the supreme court.

Where a receiver is appointed in two suits, and one is appealed, see *Lottimer v. Lord*, 4 E. D. Smith, 188.

²*Banks v. Potter*, 21 How. Pr. 469; *Voorhees v. Seymour*, 26 Barb. 569; *Re Eagle Iron Works*, 8 Paige, 385; *West v. Fraser*, 5 Sandf. 653; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Wilson v. Allen*, 6 Barb. 542; *Fairfield v. Weston*, 2 Sim. & Stu. 96; *Williamson v. Wilson*, 1 Bland, Ch. 418; *Tomlinson v. Ward*, 2 Conn. 396; *Manners v. Furse*, 11 Beav. 30; *Tyles v. Tyles*, 17 Beav. 588; *Simmons v. Henderson*, 1 Freem. Ch. (Miss.) 493; *Jones v. Dougherty*, 10 Ga. 273; *McDonald v. Dougherty*, 11 Ga. 570; *Williams v. Jenkins*, 11 Ga. 595; *Johns v. Johns*, 23 Ga. 31; *Whitehead v. Wooten*, 43 Miss. 523; *Woods v. Ellis*, 85 Va. 471; *Johnson v. Martin*, 1 Thomp. & C. 504; *Defries v. Creed*, 84 L. J. N. S. Eq. 607; *Edwards v. Edwards*, L. R. 2 Ch. Div. 291; *Mead v. Orrery*, 8 Atk. 235, but see *Dilling v. Foster*, 21 S. C. 334; *Shulle v. Hoffman*, 18 Tex. 673.

required bond, and when that is done his appointment operates by relation from the time of making the order.¹

Whatever may have been the early practice in the English court of chancery, in exceptional cases, of appointing a receiver without bond by consent of parties, such practice is no longer in force in this country and never was in the Irish court of chancery.²

¹*Re Schuyler Steam Tow Boat Co.* 136 N. Y. 169, 20 L. R. A. 391; *Re Christian Jensen Co.* 128 N. Y. 550; *Rutter v. Tallis*, 5 Sandf. 610; *Storm v. Waddell*, 2 Sandf. Ch. 544; *Wilson v. Allen*, 6 Barb. 542; *Re Berry*, 26 Barb. 55; *Voorhees v. Seymour*, 26 Barb. 581; *Deming v. New York Marble Co.* 12 Abb. Pr. 66; *Mann v. Pente*, 2 Sandf. Ch. 257; *Porter v. Williams*, 9 N. Y. 142; *Van Alstyne v. Cook*, 25 N. Y. 489; *Johnson v. Martin*, 1 Thomp. & C. 504; *Maynard v. Bond*, 67 Mo. 315; *Re Eagle Iron Works*, 8 Paige, 883; *Weil v. Tyler*, 88 Mo. 545; *Alexander v. Merry*, 9 Mo. 524; *Steele v. Sturgis*, 5 Abb. Pr. 442; *Lotimer v. Lord*, 4 E. D. Smith, 183; *Tomlinson v. Ward*, 2 Conn. 896; *Fairfield v. Weston*, 2 Sim. & Stu. 95; *Olinkcales v. Pendleton Mfg. Co.* 9 S. C. 318; *Regenstein v. Pearlestein*, 80 S. C. 192; *Ex parte Ecans*, *Re Watkins*, L. R. 18 Ch. Div. 252. This case is based upon the doctrine that the appointment of a receiver is in the nature of an equitable execution. *Re Schuyler Steam Tow Boat Co.* 43 N. Y. S. R. 163.

A contrary doctrine is held in, *De-fries v. Creed*, 34 L. J. Eq. N. S. 607; *Edwards v. Edwards*, L. R. 2 Ch. Div. 291 (see L. R. 18 Ch. Div. 255); *Farmers Bank v. Beaton*, 7 Gill. & J. 421; *Woods v. Ellis*, 85 Va. 471; *Noyes v. Rich*, 52 Me. 115.

As will be seen the great weight of authority is in favor of the doctrine stated in the text, and is based upon the following propositions: (1) The

appointment of a receiver is in the nature of an equitable execution, and relates to the date of the order made.

(2) If this doctrine were not to prevail endless confusion and waste would ensue from permitting parties with executions and attachments to intervene between the date of the order and the perfecting of the same by giving bond, and dissipate the property.

(3) That inasmuch as the appointment of itself does not disturb existing rights or liens, there can be no valid reason for permitting the custody of the property or fund to be distributed among rival officers and disputing claimants.

²*Bailie v. Bailie*, 1 Ir. Eq. 418.

On appointment the court will require receiver to give bonds. *Tomlinson v. Ward*, 2 Conn. 896.

After a decree for the sale of real estate to satisfy creditors having liens thereon, and an appeal from such decree by the debtor, the court below, in which the suit was pending, may appoint a receiver to take possession of the property and rent it out, and collect the rents, until the further order of the court; and where, in such case, the sergeant of the city in which the property was located was appointed the receiver,—*Held*, not necessary to require him to give a bond for the faithful performance of his duty, as it was covered by his official bond. Va. Code 1873, 1124, chap. 174, § 5. *Moran v. Johnston*, 26 Gratt. 108.

Prior to the filing of a bond by the receiver as required by the order, the receiver is unauthorized to sue,¹ but this rule does not apply to a case where the order does not require the giving of security.²

(b) In the absence of statutory requirements the bond is given to the people, the state, or the clerk of the court, and must be

Where the appointment of a receiver is to obtain a charge upon the defendant's property and not to take possession thereof, or collect rents, the receiver need not give bonds, the receiver and plaintiff undertaking not to act without leave of court. *Hewett v. Murray*, 54 L. J. Ch. 572, 52 L. T. 380.

Where the bond given by a receiver, upon his appointment in a suit for an account and settlement of co-partnership concerns, is not filed in the proper office, through inadvertence, the court may direct it to be filed *nunc pro tunc*. *Whiteside v. Prendergast*, 2 Barb. Ch. 471.

A law (2 Md. Code Pub. Local Laws, 28, 29) requiring the bond of a receiver to be approved by the court, but not making such approval a condition precedent. *Held*, to be only directory, and an approval *nunc pro tunc* will be valid. *Gephart v. Starrett*, 47 Md. 396.

A special receiver, to whom money is directed to be paid by a decree, should be required to give bond with approved personal security, with proper conditions, in a penalty to be fixed by the court, before he is authorized to receive the money, or any part thereof. *Carper v. Hawkins*, 8 W. Va. 291.

See also note 1, p. 74.

Where a receiver is appointed over the same property in separate suits, a bond in each action is said not to be imperative. *Banks v. Potter*, 21 How. Pr. 469.

¹ Where a receiver brought suit to set aside certain alleged fraudulent conveyances made by a debtor, it appeared that the receiver had executed an obligation in the form of a bond, but with only one surety and was without seal. *Held*, on objection for non-compliance with the order of appointment, that the suit should be dismissed. *Johnson v. Martin*, 1 Thomp. & C. 504; *Banks v. Potter*, 21 How. Pr. 469; *Conger v. Sands*, 19 How. Pr. 8; *Voorhees v. Seymour*, 26 Barb. 569. It was subsequently held, however, that an informality in the bond, as that it was not under seal, could only be taken advantage of by a debtor defendant and not by a third person. *Morgan v. Potter*, 17 Hun, 403, citing *Tyler v. Willis*, 32 Barb. 327; *Underwood v. Sutcliffe*, 10 Hun, 453.

² In *Wilson v. Welch*, 157 Mass. 77, the court say: "The fact that the complainant (receiver) has not given a bond is not a defense to this suit. Any person interested can apply to the court to have this done if thought necessary; but it is not contended that the decree appointing him receiver was on condition that he should first give a bond or that it required him to give a bond." In the absence of direct evidence it is reasonable to assume that the court on entering an order authorizing suit by the receiver ascertained that the plaintiff had duly qualified as receiver. *Hegewisch v. Süser*, 140 N. Y. 414.

approved by the court, or by the clerk of the court, where the latter is permissible, and it is so ordered.¹

The order should provide for the amount of the bond, taking into consideration the value of the property to be placed in the receiver's custody and control, and the nature and character of the trust imposed upon him. The bond is at all times subject to the order and direction of the court, and if by death of a surety, or insolvency, or other good cause, the bond is not complete or the security ample the court may, on proper application, order a new bond to be given, or new surety taken.²

(c) The sureties must be persons competent to bind themselves, and be financially responsible for the amount of the required bond. The approval of the sureties being in the discretion of the court, and the object sought being the financial responsibility of the persons tendered, it is not absolutely essential in this country that the sureties shall be freeholders,³ or even residents of the state or district in which the action is pending.⁴ And the surety may be a natural person, or a corporation organized as a guaranty company. A surety may be discharged upon obtaining the verified consent of the receiver and the remaining surety, stating that the discharge shall be without prejudice to other par-

¹ It is desirable in all cases that the bond should be presented for approval and approved at the earliest practicable moment after the entry of the order. And where by inadvertance the bond is filed in an improper office (*Whitenside v. Prendergast*, 2 Barb. Ch. 471) or for any other cause the bond is not approved at the time of entering the order, it may be approved *nunc pro tunc*. *Vaughan v. Vaughan*, Dick. 90. This is a bond given pursuant to an order or judgment of court, and is part of the machinery by which it is enabled to carry out its judgment, and is therefore one given in pursuance of law, but is not an official bond in a statutory sense. *Titus v. Fairchild*, 17 Jones & S. 211; *Gerould v. Wilson*, 81 N. Y. 578. A defect in

form and not of substance does not invalidate, it would seem. *Schoharie v. Pindar*, 8 Lans. 8; *Farley v. McConnell*, 7 Lans. 428; *Wiser v. Blachly*, 1 John. Ch. 607.

² *Averall v. Wade*, Flan. & K. 825; *Shackelford v. Shackelford*, 32 Gratt. 481.

³ Under the English practice sureties were required to be within the jurisdiction of the court, and under the Irish practice they were required to be owners of real estate. *Cockburn v. Raphael*, 2 Sim. & Stu. 458.

⁴ *Taylor v. Life Association of America*, 8 Fed. Rep. 465; *Colemore v. North*, 21 W. R. 48, 42 L. J. Ch. 4. If a surety dies insolvent, a new bond will be required. *Averall v. Wade*, Flan. & K. 341.

ties as to the past or future liability, accompanied by the declaration that they, the receiver and remaining surety, will not rely as a discharge on the vacating of the recognizance as to one of the parties, in any proceeding against them;¹ but the court will not vacate the receiver's recognizance at the time of his discharge, even upon the consent of all parties.² Neither will sureties on the bond be discharged upon their own request,³ unless underhand practice is proved and the person secured shown to be connected with such practice.⁴ Where a receiver becomes insane, his sureties may pass the accounts, pay any balance into court, and thus be discharged.⁵

(d) It is a necessary prerequisite to a suit on the receiver's bond that there shall have been an order of the court upon the receiver to render an account, and a default by him,⁶ or a rule upon him to pay over. The court will not permit a suit on a receiver's bond merely upon a showing that something is due, but the precise amount must be stated.⁷ The statute of limita-

¹ *O'Keefe v. Armstrong*, 2 Ir. Ch. 115; *Callaghan v. Callaghan*, 8 Ir. Eq. 572.

² *Fitzgerald v. Hill*, 2 Ir. Eq. 898.

³ *Griffith v. Griffith*, 2 Ves. Sr. 400.

⁴ *Hamilton v. Brewster*, 2 Moll. 407.

⁵ *Webb v. Cashel*, 11 Ir. Eq. 558; *Richardson v. Ward*, 6 Madd. 286.

⁶ *Atkinson v. Smith*, 89 N. C. 73; *Titus v. Fairchild*, 17 Jones & S. 211; *French v. Dauchy*, 57 Hun, 100.

In the case of *Atkinson v. Smith*, *ante*, the court say: "The regular course of procedure, according to well established practice in cases like this, is to proceed against the receiver in the first instance, and if he shall fail in the proper discharge of his duty within the scope of his bond, then to obtain leave to sue upon his bond. It may be that in some cases the surety might by order of court, and upon reasonable notice, be brought into the action in which the receiver had been appointed and proceeded against there-

in. But this is not the usual course pursued, nor is it to be encouraged, if indeed it could be sustained in any case. *Bank of Washington v. Creditors*, 86 N. C. 323; *Gerould v. Wilson*, 81 N. Y. 573; *State v. Gibson*, 21 Ark. 140; *People v. Murdock*, 50 Ill. App. 811.

⁷ *Ludgater v. Channell*, 15 Sim. 479, 8 Macn. & G. 175. Here the rule is criticised, and decided that where the receiver has absconded and it therefore becomes impracticable to ascertain what is due from him, suit may be maintained against the sureties. Daniel's Ch. vol. 2, p. 1757 (4th Am. ed.). And where an attachment has been issued against a receiver and he conceals himself so that service cannot be had upon him, service of the order to put his recognizance in suit may be had upon his solicitor with whom he is in communication. *O'Farrell v. McCan*, 7 Ir. Eq. 63.

tions is not pleadable to a *scire facias* upon a receiver's bond,¹ by reason of the trust relationship which the receiver occupies.

(e) The principal being held to a strict accountability to the court, it follows that his sureties are also liable *strictissimi juris*. The scope of their liability, in general, is determined by the terms and conditions of the bond or recognizance, and as a rule the liability is enforced by a common law action on such bond.² The extent of the liability may be determined in the proceeding in which the receiver is appointed, upon notice to the sureties and an opportunity for them to be heard;³ they are not, however, bound by the action of the court in fixing the liability and the amount thereof, when not made parties to the proceeding, and have therefore not been heard.⁴ The sureties are liable (1) for all money coming into the hands of the receiver at the time

¹ *Reg. v. Bayly*, 4 Ir. Eq. 142; *Seagram v. Tuck*, L. R. 18 Ch. Div. 296. The rule barring the application of the statute of limitations is based upon two grounds: (1) the debt is held to be a record, and (2) is due on a trust. "It is important," says Kay, J., in *Seagram v. Tuck*, "to hold the position of a receiver to be one in which liability to account would not easily be barred, and so long as he was living he must be held to have been a trustee of the money. Whether the debt is held to be of record or to be one on a trust, either would be an answer to the defense of the Statute of Limitations."

² *Thurman v. Morgan*, 79 Va. 867; *Weems v. Lathrop*, 42 Tex. 207; *Atkinson v. Smith*, 89 N. C. 72; *Bank of Washington v. Creditors*, 86 N. C. 323; *State v. Gibson*, 21 Ark. 140; *Ludgater v. Channell*, 8 Macn. & G. 175.

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then to obtain leave to sue on the bond."

³ *Ball v. Chancellor*, 47 N. J. L. 125; *Com. v. Gould*, 118 Mass. 300; *Nulton v. Isaacs*, 30 Gratt. 726. The sureties not being officers of court are not subject to the orders of the court respecting the default of the receiver and the payment thereof, unless they have obtained possession of the trust fund. *Seidenbach v. Denkleseil*, 11 Lea, 297.

And see *Atkinson v. Smith*, 89 N. C. 72; *Bank of Washington v. Creditors*, 86 N. C. 323.

⁴ *Thomson v. MacGregor*, 81 N. Y. 592. It may be possible, however, for the sureties to make themselves liable by the terms of the bond, as where there is a special covenant in the bond making an adjudication against the principal binding on the surety. *Douglas v. Howland*, 24 Wend. 85; *Thomas v. Hubbell*, 15 N. Y. 407; *Thayer v. Olark*, 4 Abb. App. Dec. 391; *Rapelye v. Prince*, 4 Hill, 119; *Baggett v. Boulger*, 2 Duer, 160; *Smart v. Flood*, 49 L. T. 467; limited only by the amount of the bonds. *Graham v. Noakes* [1895] 1 Ch. 66, 64 L. J. Ch. 98.

of his giving bond and what he receives thereafter, but not for acts of the principal prior to the giving of the bond unless the terms of the bond make them so.¹ This liability continues though the order appointing a receiver is subsequently annulled on appeal,² or the suit discontinued.³ (2) They are also liable for money which the receiver had borrowed from the debtor prior to his appointment, and failed, as receiver, to account for; and (3) for interest on a balance due from the receiver, unless there has been great delay in passing the receiver's accounts;⁴ (4) and for costs of proceedings taken to enforce payment of a balance due from the receiver.⁵

¹ *Thomson v. MacGregor*, 81 N. Y. 593 (reversing 18 Jones & S. 197); *Bissell v. Saxton*, 66 N. Y. 60; *United States v. Giles*, 18 U. S. 9 Cranch, 212, 8 L. ed. 708; *Farrar v. United States*, 80 U. S. 5 Pet. 373, 8 L. ed. 159.

² *Macready v. Schenck*, 41 La. Ann. 456.

³ *State v. Gibson*, 21 Ark. 140.

⁴ *Com. v. Gould*, 118 Mass. 300.

⁵ *Durson v. Raynes*, 2 Russ. Ch. 466.

⁶ *Re Lockett*, 1 Phill. Ch. 508, 14 L. J. Ch. N. S. 164; *Maunsell v. Egan*, 8 Ir. Eq. 372; *Contra Walters v. Walters*, 11 Ir. Eq. 335. See also *Mann v. Stennett*, 8 Beav. 189.

CHAPTER III.

RECEIVER'S POWERS.

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§ 24. Generally.

The powers of a receiver are derived from two sources, and are to be determined from the nature of the proceeding and the duties imposed upon him, by virtue of his office. As we have seen, the appointment of a receiver is the exercise of a purely provisional remedy by a court of chancery. The courts of chancery, both in this country and in England, by a long line of decisions reaching back for more than two centuries, have marked out the jurisdiction exercised by courts in this respect and defined, with tolerable accuracy, the cases in which this extraordinary power is exercised.¹ So that as a primary source of power we are to look to rules of practice as established by courts of equity in the appointment of receivers. In some states and countries where no chancery courts exist as distinctive courts of general jurisdiction, the common law courts of general jurisdiction are vested with chancery powers and administer this branch of equity jurisprudence, but are still guided by the general principles established by the courts of chancery. With the introduction of the code practice in most of the states of this country, and the modifications of the common law practice, by statutory enactments in other states and countries the jurisdictions of courts in the appointment of receivers has been somewhat enlarged, as well as the scope and powers of receivers, in some particulars, but the general scope of the law of receivership, practice and powers of receivers remains comparatively unaffected by the code enactments. In many of the states, however, are found special statutes relating to insolvency, corporations and kindred matters

¹ *Corey v. Long*, 12 Abb. Pr. N. S. 427.

wherein are special provisions relating to the appointment of statutory receivers, their functions, powers, duties, and official relations, which are *sui generis*, and are treated of herein under a special chapter. Of such character are the Companies Act, and various winding-up acts of England, principally relating to corporations, in which the ministerial officer charged with specific duties analogous to those of receivers, and designated as liquidators, are appointed, sometimes by the corporations, and sometimes by the courts.

§ 25. Source of power ; incidents.

(a) POWERS SHOULD BE EMBRACED IN ORDER.

Owing to the nature of the proceeding, and the objects sought to be accomplished by the receivership, and to the fact that the appointment of a receiver rests, in all cases, in the sound judicial discretion of the court, the receiver's powers and duties should be embodied in the order of appointment.¹ The order of appoint-

¹ *Grant v. Davenport*, 18 Iowa, 179; *Davis v. Gray*, 83 U. S. 208, 21 L. ed. 447; *Hooper v. Winston*, 24 Ill. 858. In this case it was contended that the powers of the receiver were enlarged and extended by stipulation of the parties, and that by reason thereof he was vested with larger discretionary powers than ordinarily attach to a receivership. But the court say: "We do not deny that he had some discretion in this matter, but it was very limited. We hold, being an officer of court, he should have applied to the court for leave to make these expenditures, and he is answerable to the court for the exercise of all his powers." In *Benneson v. Bill*, 62 Ill. 408; *Yeager v. Wallace*, 44 Pa. 296; *People v. St. Nicholas Bank*, 76 Hun, 522; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438, 452; *Re Colvin*, 8 Md. Ch. 278. See discussion of the powers of temporary and permanent receivers in *Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 840. The

original order may be enlarged from time to time as the exigencies of the case may require. "Since the receiver is an officer, or, as he is sometimes called, 'the hand' of the court, it would be singular if he could not, at any time, go to it with his complaint, or for instructions in regard to any matter touching the fund placed in his custody." *People, Att. Gen., v. Security L. Ins. & Annuity Co.* 79 N. Y. 270; *Curtis v. Leavitt*, 1 Abb. Pr. 274. As to what is embraced in the scope of the order see *Benneson v. Bill*, *supra*; *American Const. Co. v. Jacksonville, T. & K. W. R. Co.* 52 Fed. Rep. 937. While it is true that the receiver is an officer of the court, yet that fact does not confer upon him any special privileges so far as rights of action are concerned over other persons bringing suit. *New Brunswick State Bank v. First Nat. Bank*, 34 N. J. Eq. 450. Such a receiver has only the power and authority given him in his orders.

ment should point out distinctly the general scope of the receiver's powers and duties so that, at least in a general sense, he will be enabled to understand the official duties imposed upon him, and for the faithful discharge of which he is to become responsible. (1) By the earlier English practice the receiver was supposed to occupy a position of such extreme indifference as between the parties that all applications to the court for directions to the receiver were to be made by the proper parties to the suit, and the receiver was not permitted to apply to the court for directions until he had first made request of the plaintiff or defendant to make the desired application and have been refused by him.¹ (2) This rule of practice, however, has no force in this country, and owing to the fact that the receiver is the instrument or hand of the court, he is privileged, and it is his duty, to apply to the court at any and all times for instructions and directions as to his powers and duties.²

(b) PRACTICE OF THE COURT.

A second source of power of ordinary receivers is to be found in the course and practice of the courts relative to receiverships. The courts exercising chancery jurisdiction have established by long usage and experience certain well defined rules relating to the powers of receivers, and it is to these rules so established that we must usually go to determine the scope of authority of the ordinary receiver.³

Chautauque County Bank v. White, 6 Barb. 589; *Republic L. Ins. Co. v. Swigert*, 185 Ill. 150, 12 L. R. A. 528.

Whether the order be comprehensive in regard to the power given the receiver, or his power be given from time to time, as occasion requires, the court is in fact the real custodian of the property, and the acts of the receiver are acts of the court designed to preserve the property for the benefit of the parties subsequently shown to be entitled to it. *Devendorf v. Dickinson*, 21 How. Pr. 275.

¹ *Parker v. Dunn*, 8 Beav. 497; *Re Doolan*, 2 Connor & L. 232; *Clark v. Fisher*, Sausse & Sc. 684; *O'Connor v. Malone*, 1 Ir. Eq. 20; *Wrixson v. Vize*, 5 Ir. Eq. 276; *Richards v. Gould*, 7 Ir. Eq. 209.

² *Curtis v. Leavitt*, 1 Abb. Pr. 274.

³ *Verplanck v. Mercantile Ins. Co.* 2 Palge, 438; *Hooper v. Winston*, 24 Ill. 858; *Chautauque County Bank v. White*, 6 Barb. 589; *Booth v. Clark*, 58 U. S. 17 How. 222, 15 L. ed. 164; *Republic L. Ins. Co. v. Swigert*, 185 Ill. 150, 12 L. R. A. 528.

(c) POWERS OF STATUTORY RECEIVERS, EXPRESS OR IMPLIED.

Statutory receivers, or those appointed pursuant to the requirements of statute, as will be seen elsewhere, derive their general powers wholly from the statute under which they are appointed, and have no powers except those conferred by it, either by express terms or such as can be fairly implied from the general scope of the statute, or as an incident to an express power given.¹ The power thus conferred is deemed delegated and requires careful consideration by the court in its exercise.²

(d) POWER BEING LIMITED IS NOTICE TO ALL.

A receiver by virtue of his office is possessed of limited powers and all persons dealing with him must take notice of such limitations, and contract with him with such knowledge.³ This principle is not peculiar to the law of receivership but applies to judicial sales made by ministerial officers generally. As in dealing with a special agent every one must know that the scope of the receiver's powers is limited and special, and his acts at all times subject to modification or annulment.

(e) POWERS REMAIN DURING CONTINUANCE OF SUIT.

Unless sooner discharged his powers remain during the continuance of the litigation, and, as a rule, are not suspended during appeal,⁴ though there are exceptions elsewhere noticed.

¹ *Runyon v. Farmers & M. Bank*, 4 N. J. Eq. 480; *Atty. Gen. v. Life & F. Ins. Co.* 4 Paige, 224. See *Knott v. Morris Canal & Bkg. Co.* 4 N. J. Eq. 423; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 452; *Atty. Gen. v. Atlantic Mut. L. Ins. Co.* 77 N. Y. 836.

A receiver appointed by a Federal court must manage and operate the property in accordance with the state where the property is situated. Act of Congress, March 3, 1887, § 2. The power conferred on statutory receivers may not always be express but may be inferred from the general scope of the statute, as where authority is given to hear and determine the validity of claims, this embraces implied power to administer oaths to

witnesses. *Runyon v. Farmers & M. Bank*, 4 N. J. Eq. 480.

² *Oakley v. Paterson Bank*, 2 N. J. Eq. 173; *Davis v. United States Elec. P. & L. Co.* 77 Md. 35; *Bangs v. McIntosh*, 28 Barb. 591.

³ *Tripp v. Boardman*, 49 Iowa, 410; *Barrow v. Mullin*, 21 Minn. 374; *Lehigh Coal & Nav. Co. v. Central R. Co.* 35 N. J. Eq. 426.

⁴ *Brien v. Paul*, 3 Tenn. Ch. 357. Although the appeal may suspend or vacate the final decree. *Merrill v. Elam*, 2 Tenn. Ch. 513; *Stafford v. Union Bank*, 57 U. S. 16 How. 140, 14 L. ed. 878; *Swing v. Townsend*, 24 Ohio St. 1; *Schenck v. Peay*, 1 Dill. 270; *Re Real Estate Associates*, 58 Cal. 356.

(f) IRREGULAR APPOINTMENT, CONFIRMED HOW.

The appointment of a receiver regularly and legally made at final judgment or decree vests in him all the powers and duties usually pertaining to his office, though a previous irregular and illegal appointment has been made, during the pendency of the action.¹ The final action of the court becomes retrospective so far as his acts as receiver are concerned. Nor can his powers and acts be questioned in a collateral proceeding,² except in a case where the court is without jurisdiction in making the appointment.³

§ 26. Power to borrow money.

(a) Where the order of the court gives to the receiver authority to continue in the possession and management of the property, he may in good faith borrow the necessary money for the successful and proper management of such property, and the claim of the lender will be superior to that of bondholders.⁴ (b) And in case of

¹*Re Stonebridge*, 37 N. Y. S. R. 617, Affirmed without opinion in 128 N. Y. 618; *Russell v. East Anglian R. Co.* 3 MacN. & G. 104; *American Bank v. Cooper*, 54 Me. 438; *Ames v. Birkenhead Docks Trustees*, 20 Beav. 332; *Cook v. Citizens' Nat. Bank*, 73 Ind. 256; *People, Davis, v. Sturtevant*, 9 N. Y. 263; *Albany City Bank v. Schermerhorn*, 9 Paige, 372; *Richards v. People*, 81 Ill. 551; *Lutt v. Grumont*, 17 Ill. App. 308.

²*Edrington v. Fridham*, 65 Tex. 612; *Wood v. Blythe*, 46 Wis. 650; *Keokuk N. L. Packet Co. v. Davidson*, 13 Mo. App. 561; *Dean v. Thatcher*, 32 N. J. L. 470; *Mercantile Trust Co. v. Pittsburg & W. R. Co.* 29 Fed. Rep. 782; *Ward v. Farwell*, 97 Ill. 593; *Whittlesey v. Frantz*, 74 N. Y. 456; *Richards v. People*, 81 Ill. 551; *Commercial Nat. Bank v. Burch*, 141 Ill. 519; *Stanley v. National Union Bank*, 115 N. Y. 123; *First Nat. Bank v. United States Encaustic Tile Co.* 105 Ind. 227; *Pressley v. Lamb*, 105 Ind. 171; *Bodkin v. Merit*, 102 Ind. 293;

Greenawalt v. Wilson, 52 Kan. 109; *Neeves v. Boos*, 86 Wis. 313; *Thompson v. Holladay*, 15 Or. 34; *Radebaugh v. Tacoma P. R. Co.* 8 Wash. 570; *Elderkin v. Peterson*, 8 Wash. 674.

³*Texas & P. R. Co. v. Gay*, 86 Tex. 571, 25 L. R. A. 52; *St. Louis & S. Coal & Min. Co. v. Sandoval Coal & Min. Co.* 111 Ill. 32.

⁴*Ex parte Carolina Nat. Bank*, 18 S. C. 289; *Re Fifty-four First Mortgage Bonds*, 15 S. C. 304; *Ex parte Benson*, 18 S. C. 38; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Cowdry v. Galveston, H. & H. R. Co.* 1 Woods, 331. In this case the court say: "All outlays made by the receivers in good faith in the ordinary course with a view to advance and promote the business of the road and to render it profitable and successful are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management of a railroad in his hands."

Greenwood v. Algeiras R. Co. [1894] 2 Ch. 205, 63 L. J. Ch. 670. This case is based upon the fact that there must

the foreclosure of a mortgage or trust deed on a railroad, where it is necessary to preserve the road as a going concern, the court may properly order the receiver to complete some inconsiderable portions of the road, and put the road in condition for the transaction of business, and borrow money for that purpose, and make the certificates a lien superior to that of the first mortgage.¹ The

be an emergency, and that the borrowing of the money is essential to the preservation of the property. In *Bank of Montreal v. Chicago, O. & W. R. Co.* 48 Iowa, 518, a receiver was authorized to issue certificates "for money borrowed, materials furnished, labor performed, or on account of contracts made by him for the construction or completion of said road or any part thereof," and such certificates so issued were made a first lien on the road. It was held that certificates issued prior to the furnishing of the material or performance of the labor were void. The furnishing of the material and the performance of the work were prerequisites to the issuing of certificates.

See generally chapter on Receivers' Certificates. This power should be exercised with the acquiescence of all parties concerned, if possible, *Wallace v. Loomis*, 97 U. S. 146, 162, 24 L. ed. 895, 901, and with caution. For a full discussion of the power in its many phases, see, *Credit Co. v. Arkansas C. R. Co.* 15 Fed. Rep. 46; *Taylor v. Philadelphia & B. R. Co.* 7 Fed. Rep. 377; *Kennedy v. St. Paul & P. R. Co.* 2 Dill. 448; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963; *Millenberger v. Logansport, O. & S. W. R. Co.* 106 U. S. 285, 27 L. ed. 117; *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 187; *Cowdry v. Galveston, H. & H. R. Co.* 1 Woods, 831; *Stanton v. Alabama & O. R. Co.* 2 Woods, 506; *Meyer v. Johnston*, 53 Ala. 237; *Vermont & C. R. Co. v. Vermont C. R. Co.* 46 Vt. 792, 50 Vt. 500; *Hoover v. Montclair & G. L. R. Co.* 29 N. J.

Eq. 4; *Bank of Montreal v. Chicago, O. & W. R. Co.* 48 Iowa, 518.

As to power to mortgage see *Burroughs v. Gaither*, 66 Md. 171.

And power to invest, see *Utica Ins. Co. v. Lynch*, 11 Paige, 520; but see *Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 84.

In the case of *Meyer v. Johnston*, *supra*, the power of the receiver to borrow money is elaborately discussed after an exhaustive argument by counsel, and the reasons both for and against the exercise of this power are clearly stated (p. 846).

Where a receiver borrowed money and used the same to discharge a valid lien on the property in his care and custody and acted in good faith, it was held proper to allow him credit therefor. *Heffron v. Rice*, 149 Ill. 216.

The power to incur expense does not extend beyond what is absolutely essential to the preservation and use of the property. *Cowdrey v. Galveston, H. & H. R. Co.* 93 U. S. 352, 23 L. ed. 951.

¹*Stanton v. Alabama & O. R. Co.* 2 Woods, 506.

Whether the court has authority to permit receivers of a railroad to borrow money to buy rolling stock where there is income from which the rolling stock might be bought, has been doubted; but where the receivership is nearly at an end, it is inexpedient to make such an order. *Re Philadelphia & R. R. Co.* 14 Phila. 501.

See further upon this subject title *Railway's and Receiver's Certificates*.

source of this power is to be found in the inherent right of the court to preserve the receivership property from waste, damage or loss. And in case of public corporations the public have interests that are to be protected. The power to borrow money in all cases presupposes authority from the court given for that purpose, based on specific application either by the receiver or plaintiff; and the exercise of the power is with great caution.

The power to mortgage is, in principle, the same as the power to issue receiver's certificates and make them a first lien upon the property. There must be the gravest necessity to justify an order of this kind, and more especially so where the property is not charged with a public trust.¹

§ 27. Power to loan money.

(a) The receiver being in one sense a trustee, and in another sense an officer of court, in the absence of specific authority, so to do from the court appointing him, has no authority to loan the money in his hands as receiver. (b) And if he has authority to loan, given to him, he cannot loan to himself, or to a firm of which he is a member.² But when the receiver's funds have been loaned without authority, and a note taken therefor, such want of authority in the receiver is no defense to an action on the note.³ (c) And when the money is loaned to a firm of which the receiver is a member, and repaid by the firm to one of its members, who converts such money to his own use, the firm still remains liable for the money loaned.⁴ (d) Where the receiver has loaned his trust fund to brokers, without authority of the court, but in entire good faith, and has charged himself with the amount received as interest, no part of the fund being lost, and no one injured, the receiver is not liable for interest beyond the amount received.⁵

As to the power of the receiver to invest funds belonging to the estate it would seem to be exceedingly questionable. It is, as a rule, wholly foreign to the functions of a receiver to do more than collect in the estate, preserve the same, and distribute as di-

¹*Burroughs v. Gaither*, 66 Md. 171.

²*Ryan v. Morrill*, 88 Ky. 352; *Darby v. Gilligan*, 37 W. Va. 59; *Heffron v. Rice*, 149 Ill. 216.

³*Corbin v. De la Vergne*, 44 N. J. L. 70.

⁴*Ryan v. Morrill*, 88 Ky. 352.

⁵*Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 94 (modifying 28 Hun, 294); *Utica Ins. Co. v. Lynch*, 11 Paige, 520.

rected by the court, and if he loans out receivership funds even temporarily to his friends, or others, it is a breach of trust. He may not mix the funds with his own and use them, nor make a profit out of them.¹

§ 28. Power to compromise debts.

(a) Where doubtful and disputed claims are presented for allowance against the estate over which the receiver is appointed, the receiver, by direction of the court, may allow so much of such claims as he may deem just and equitable.² (b) And it is proper for the court to give the receiver general power to compromise with debtors to the estate where it appears to him expedient and for the interest of all concerned so to do, such debtors being unable to pay in full.³ (c) But the power to compromise a statutory liability is extremely doubtful, and where it appears that the debtor has fraudulently transferred his property to avoid his legal obligations, or to shield himself from injury and exposure from litigation, the power to compromise should be withheld from the receiver.⁴ Where it is sought to establish that the receiver's contract is illegal and void as being in violation of the constitution forbidding undue or unreasonable discrimination in freights it must distinctly appear wherein there is want of authority; it will not be assumed that the contract in question is in violation of authority.⁵ (d) A receiver has no authority to commute a debt.⁶ (e) And where a partner in the absence of special authority, or a special course of

¹Authorities, note 5, p. 87.

²*Re Croton Ins. Co.* 3 Barb. Ch. 642. This power will not be granted if the debtor has fraudulently conveyed his property to avoid liability. *Re Certain Stockholders of California Nat. Bank*, 53 Fed. Rep. 38; *Suydam v. Bank of New Brunswick*, 3 N. J. Eq. 276. See also *Re Platt*, 1 Ben. 534; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476; *Henderson v. Meyers*, 11 Phila. 616; *Wilkinson v. Dodd*, 40 N. J. Eq. 124. A receiver of a national bank may compromise. See U. S. Rev. Stat. § 5234.

³*Re Croton Ins. Co.* 3 Barb. Ch. 642. This power being subject to great

abuse is exercised with caution. And see *Kimball v. Lee*, 40 N. J. Eq. 408; *Wilkinson v. Dodd* (1886) 40 N. J. Eq. 128; *Dodd v. Wilkinson*, 41 N. J. Eq. 566.

⁴*Re Certain Stockholders of California Nat. Bank*, 53 Fed. Rep. 38. Mr. Justice Ross in this case characterizes the compromise with a stockholder of a bank who has fraudulently disposed of his property to avoid a legal liability as "a premium on fraud," and contrary to fair dealing and good faith.

⁵*Bayles v. Kansas P. R. Co.* 13 Colo. 181.

⁶*Paxton v. Steele*, 86 Va. 811.

dealing, has no power to accept shares in a company even though fully paid up in satisfaction of a debt due the firm, the court has no jurisdiction in winding up the partnership to confer on a receiver greater power than a partner would have had in this respect.¹

§ 29. Power to employ counsel.

(a) MUST HAVE GENERAL OR SPECIAL POWER.

The receiver, occupying as he does in many cases, an important position of trust, and often attended with difficult questions of doubt as to the most judicious and proper course to pursue, and where the attitude of the parties is often hostile towards each other, it would seem to be not only the receiver's right but his duty to employ counsel to advise him as to the management of the property placed in his hands and as to his duties in the premises.² It is true that he is an officer of the court and has an undoubted right to apply to the court for direction, but the duties of the court to the public, and other litigants, are such that the guidance of the court in many of the important details of complicated receiverships is not to be expected and would be an impossibility. And while the receiver, without an order of court so authorizing him, may be justified in employing counsel, particu-

¹*Niemann v. Niemann*, L. R. 43 Ch. Div. 198.

Where the statute provides that the receiver "upon the order of a court of record of competent jurisdiction may sell or compound all bad or doubtful debts," and where it is shown by the evidence that the claims uncollected seem to be valid and enforceable to a far greater amount than those against the bank, the court will not authorize the receiver to compromise all claims for and against the bank by surrendering all its remaining assets in consideration of sufficient money to make a certain dividend, and particularly where the cash on hand is sufficient to make the same dividend. Such a compromise would be a surrender of the rights of the bank to

a large and unjustifiable extent. *Re First Nat. Bank of St. Albans*, 49 Fed. Rep. 120.

²*Hubbard v. Camperdown Mills*, 25 S. C. 496; *Walsh v. Raymond*, 58 Conn. 251; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Corey v. Long*, 12 Abb. Pr. N. S. 427 (443). Where the interests of the parties are antagonistic it is inexpedient, as a rule, to employ the counsel of either. *Adams v. Woods*, 8 Cal. 306; *Blair v. St. Louis, H. & K. R. Co.* 20 Fed. Rep. 848; *Re Ainsley*, 1 Edw. Ch. 576; *Ray v. Macomb*, 2 Edw. Ch. 165; *Ryckman v. Parkins*, 5 Paige, 548. But see *Warren v. Sprague*, 11 Paige, 200; *Smith v. New York Consol. Stage Co.* 28 How. Pr. 377, 18 Abb. Pr. 481; *Shainwald v. Lewis*, 8 Fed. Rep. 878.

larly where the court is cognizant of the duties expected of the receiver, and of the services performed by counsel in his behalf, yet the receiver in every case should see that he is protected in the employment of counsel by the general or some special order of court. The necessity of an order is rendered specially important to the receiver in view of the fact that compensation of counsel is, in all cases, to be passed upon by the court.¹ As to the amount of compensation to be allowed, the usual and proper method is to refer the matter to a master to enquire and report what would be a proper fee, and in doing so the reference in no case should be *ex parte*.²

(b) WHO EMPLOYED.

(1) As a rule the receiver should not employ as counsel the solicitor or attorney of either of the parties to the proceeding.³ The propriety of enforcing this rule in most cases is apparent, the purpose being to sustain the independent character of the receiver's office and to protect the interests of all parties concerned and divest the receiver of all appearance of favor or partiality. The rule, however, is not an unbending rule, for by consent of all parties the receiver may properly employ the solicitor of either to aid him in the discharge of his duties. (2) In such case a mere stranger has no right to complain, as where a suit is instituted by the receiver through the solicitor of one of the parties to suit in which he is appointed, against a third party.⁴ (3) And there are cases in which

¹ *Walsh v. Raymond*, 58 Conn. 251. In this case Mr. Justice Hall says: "We cannot conceive that any attorney-at-law, whose every act must be with full knowledge that he is acting for an officer of the court, will complain that in accepting employment for a receiver he is held to do so with the understanding that his compensation will depend upon the amount that may be allowed him therefor by the court upon the final accounting of the receiver." See also *Corey v. Long*, 13 Abb. Pr. N. S. 427 (448); *Re Bank*, 6 Paige, 213.

² *Hubbard v. Camperdown Mills*, 25 S. C. 496.

³ *Adams v. Woods*, 8 Cal. 306; *Ray v. McComb*, 2 Edw. Ch. 165; *Re Ainsley*, 1 Edw. Ch. 676; *Warren v. Sprague*, 11 Paige, 209; *Blair v. St. Louis, H. & K. R. Co.* 20 Fed. Rep. 848; *Ex parte Pincke*, 2 Meriv. 452; *Wilson v. Poe*, 1 Hog. 322; *Stone v. Wishart*, 2 Madd. 64; *Moore v. O'Loughlin*, 3 L. R. (Ir.) 405; *Garland v. Garland*, 2 Ves. Jr. 137; *Ryckman v. Parkins*, 5 Paige, 548; *Merchants' & M. Nat. Bank v. Kent*, 43 Mich. 292; *Smith v. New York Consol. Stage Co.* 28 How. Pr. 377.

⁴ *Warren v. Sprague*, 11 Paige, 200. It is not incumbent on the court, nor can the receiver as a matter of right

the employment of complainant's solicitor by the receiver as his solicitor is commendable as in case of fraudulent transfers of property.¹ (4) In supplementary proceedings it is held that the duties of the plaintiff's attorneys ceased at the time of the rendition of the judgment, and that the receiver can employ other counsel.²

§ 30. Power to sue.

A receiver without the power to sue for and recover the property or fund over which he is appointed would in many cases defeat the very purposes for which he is appointed. Consequently in all forms of receivership this power is recognized and well established. The general rules applicable to the subject are briefly stated as follows:

require the court even with the consent of all parties, to appoint a particular attorney of his selection. *First Nat. Bank v. Navarro*, 48 N. Y. S. R. 813; *Merchants' & M. Nat. Bank v. Kent*, 48 Mich. 292. In this case Mr. Justice Cooley says: "We cannot shut our eyes to the fact that the law partner of the solicitor is presumptively as much interested in the proceedings as the solicitor himself, and it would be peculiarly objectionable that he should act in a position requiring impartiality in a case like this where the parties to the suit are manifestly acting in concert and adversely to the interest of other persons who cannot watch their proceedings. The practical results would be that the receiver would supervise his own accounts. The practice in equity does not even permit the receiver to employ a solicitor in the case as his own counsel, lest it might disarm his vigilance in watching the receiver's proceedings. This rule may no doubt be departed from by consent of all parties concerned; but this must mean by consent of all parties concerned in the results of the receivership; and one not a party to the suit may be as much concerned in

these as the persons who are parties." It is true this case relates to the receivership and not his counsel, but the principle is the same in both cases.

¹*Shainwald v. Lewis*, 8 Fed. Rep. 878. In this case the court says: "The person who is of all the fittest to advise the receiver, and, if necessary, to stimulate his efforts is the solicitor who, with indefatigable industry and tenacity has succeeded in exposing the fraudulent conspiracy which lies at the foundation of all these proceedings, and has obtained after protracted litigation the decree against respondent. No other counsel could feel the same desire as he that the decree should not prove a *brutum fulmen*, nor the same interest in baffling the confessed fraudulent machinations of the respondent to escape its payment." And see also *Wetter v. Schlieper*, 7 Abb. Pr. 92; *Bank of Monroe v. Schermerhorn*, Clarke, Ch. 366; *Siney v. New York Consol. Stage Co.* 28 How. Pr. 481; *Hynes v. McDermott*, 3 N. Y. S. R. 582.

²*Moore v. Taylor*, 40 Hun, 56; *Egan v. Rooney*, 38 How. Pr. 121; *Lusk v. Hastings*, 1 Hill, 656. But see *Glenville Woolen Co. v. Bixley*, 43 N. Y. 206.

(a) All suits by him are under the direction and control of the court.¹

(b) The rights of action such as might have been maintained by the person over whose estate he is appointed are equally available to the receiver,² and are subject to the same conditions and limitations.³

(c) Leave of court to sue, general or special, is an essential foundation for suit.⁴

(d) He must also allege and prove his authority to bring suit.⁵

(e) The receiver of an insolvent corporation has the right to sue or defend an action to avoid any instrument which is invalid as to creditors, and in such case the adjudication of insolvency and appointment of a receiver, appropriates the property of the debtor to the payment of his debts, and authorizes a receiver of this class as representing the creditors to take such proceedings as the creditors might do if no assignment had been made. A judgment as a prerequisite to institute proceedings of this nature is not required.⁶ This rule, however, is not to be extended to the class of receiverships where the receiver represents alike all parties to the proceeding.⁷ Nor to suits pending at the time of his appointment, unless he has instructions to participate therein.⁸

¹*Re Merritt*, 5 Paige, 125.

²*Curtis v. McIlhenny*, 5 Jones, Eq. 290; *Falkenback v. Patterson*, 48 Ohio St. 359; *Coops v. Bowles*, 28 How. Pr. 10; *Davis v. Ladoga Creamery Co.* 128 Ind. 222; *Freesman v. Winchester*, 10 Smedes & M. 577; *New Brunswick State Bank v. First Nat. Bank*, 34 N. J. Eq. 450.

³*Bell v. Shibley*, 38 Barb. 610; *Williams v. Babcock*, 25 Barb. 109; *Thomas v. Whallon*, 81 Barb. 172; *Waddle v. Hudson*, 96 Mich. 432; *Litchfield v. Peck*, 29 Conn. 384; *State, Shepard, v. Sullivan*, 120 Ind. 197.

⁴*Green v. Winter*, 1 Johns. Ch. 60; *Wynn v. Newborough*, 8 Bro. C. C. 88; *Battle v. Davis*, 66 N. C. 252, *Contra, Weill v. First Nat. Bank*, 106 N. C. 13; *Everett v. State, McKaig*, 28 Md. 190; *Screen v. Clark*, 48 Ga. 41.

⁵*Scott v. Duncombe*, 49 Barb. 78.

Stewart v. Beebe, 28 Barb. 34; *Bangs v. McIntosh*, 28 Barb. 591; *White v. Low*, 7 Barb. 204; *Platt v. Crawford*, 8 Abb. Pr. N. S. 297; *Oheney v. Fisk*, 22 How. Pr. 236; *Gillet v. Fairchild*, 4 Denio, 80; *Manley v. Rassiga*, 18 Hun, 288; *Rockwell v. Merwin*, 45 N. Y. 166; *Potter v. Merchants' Bank*, 28 N. Y. 641; *Dayton v. Connah*, 18 How. Pr. 326; *Coops v. Bowles*, 28 How. Pr. 10; *Boland v. Whitman*, 33 Ind. 64; *Helme v. Littlejohn*, 12 La. Ann. 298; *Hayes v. Broteman*, 46 Md. 519; *Frank v. Morrison*, 58 Md. 423.

⁶*Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120; *Pillsbury v. Kingon*, 38 N. J. Eq. 287; *Doe, Grimsby, v. Ball*, 11 Mees. & W. 531; *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 12 L. R. A. 588, see *Shaw v. Glen*, 37 N. J. Eq. 82.

⁷See chap. vi. §§ 68.

⁸*Gadsden v. Whaley*, 14 S. C. 210; *Tracy v. First Nat. Bank*, 37 N. Y.

§ 31. Power to make repairs.

(a) The power of a receiver to make repairs without an order of court authorizing him is exceedingly limited,¹ but allowances of courts have become more liberal in this regard where it is shown that the expenditures are for the lasting benefit of the estate,² and where the receiver has acted in good faith and for the best interests of the property intrusted to him, or where it is necessary to act immediately in order to prevent damage.³ But it would seem that before the court will make an allowance for such purpose without an order previously authorizing expenditures, it must appear that had application been made the court without doubt would have granted the order in the first instance.⁴

(b) The power of the court to authorize the receiver to make repairs, and charge the expense to the estate, is much more liberal, and indeed must be, in case of receiverships of railways, where not only the interests of the parties are involved, but the convenience of the public is to be conserved.⁵ A railroad receiver may contract with another company for exchange of track facilities.⁶ But there is a limitation on the power of the receiver to make contracts, and he has no right to make a contract involving large outlays that may extend beyond the lifetime of the receivership.⁷

523. This will be the subject of further consideration under the title of Suits by Receivers, chap. vi.

¹ *Atty Gen. v. Vigor*, 11 Ves. Jr. 563; *Ex parte Marton*, *Ex parte Hilbert*, 11 Ves. Jr. 897; *Hooper v. Winston*, 24 Ill. 353. A receiver is not authorized without a previous order of court to incur any expense on account of property in his hands beyond what is absolutely essential to its preservation and use as contemplated by his appointment. *Cowdrey v. Galveston, H. & H. R. Co.* 93 U. S. 352, 23 L. ed. 951.

² *Blunt v. Clitherow*, 6 Ves. Jr. 799 (note); *Atty Gen. v. Vigor*, 11 Ves. Jr. 563; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 52 Fed. Rep. 908.

³ *Heffron v. Milligan*, 40 Ill. App. 291; *Thornhill v. Thornhill*, 14 Sim. 600; *McCartney v. Walsh*, Hayes, 29,

(note). But see, *Wyckoff v. Scofield*, 103 N. Y. 630.

The court may leave to the discretion of its receiver the price to be paid for work which he is authorized to contract for. *Girard L. Ins. A. & T. Co. v. Cooper*, 162 U. S. 529, 40 L. ed. 1062.

⁴ *Brown v. Hazlehurst*, 54 Md. 28.

⁵ *Hoover v. Montclair & G. L. R. Co.* 29 N. J. Eq. 4; *Morison v. Morison*, 7 DeG. M. & G. 214; *Stanton v. Alabama & C. R. Co.* 2 Woods, 506; *Bright v. North*, 2 Phill. 216; *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 187.

⁶ *Jourdan v. Long Island R. Co.* 42 Hun, 657, see further under title of Railways.

⁷ *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 L. ed. 819. In *Barton v. Barbour*, 104 U. S. 126,

§ 32. Power to purchase supplies, labor, etc.

In this connection the power of a receiver to purchase supplies, employ labor, and make expenditures, relating, as it does, principally to railroad receiverships, will be considered only briefly, being dwelt upon more specifically in another connection. It may be stated as a general proposition that the ordinary outlays where the amounts are small, and which are necessary to preserve and protect the property from loss or injury, may be made by the receiver as fairly within the line of discretion which is necessarily allowed to him intrusted, as he is, with the faithful and successful management of the property. In cases, however, involving large outlays his business sagacity would suggest, and it is the duty of the receiver to apply to the court for its sanction and authority for the contemplated expenditure.¹ Assuming this application to have been made it becomes a matter of importance to determine the scope of power the court will exercise in authorizing its receiver to make expenditures upon the trust property in the shape of supplies, labor, improvements, etc. In the great majority of cases it is not necessary that the business of the concern over whose property the receiver is appointed should be continued as a going concern; on the contrary, experience has demonstrated that, as a general rule, the sooner a conversion of the assets is made, and a distribution of the proceeds effected the better for all concerned. But in the matter of railroad receiverships, and others of a *quasi* public character, it is an important factor that the business of the company shall be kept in operation. In fact the only means by which the most valuable part of the property of a railroad corporation can be preserved and saved from ruinous deterioration is by continuing the road in full operation. Both public right and private interest require this. Obviously, this cannot be done unless authority exists somewhere to make contracts which shall bind the trust, and by reason and analogy the proper repository of this authority is the receiver.

26 L. ed. 672, the court says: "It has come to be settled law that a court of equity may, and in most cases ought to authorize its receiver of a railroad property to keep it in repair, and to manage and use it in the ordinary

way until it can be sold to the best advantage of all interested." *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895.

¹ *Cowdry v. Galveston, H. & H. R. Co.* 1 Woods, 331.

And inasmuch as the law never imposes a duty without giving the person charged with its performance sufficient power to do his duty, it has become an established rule supported by a long list of precedents that a receiver, of this character, as a necessary incident to the duties imposed upon him, has authority under the direction of the court, to make all such contracts for labor and supplies as are reasonably necessary to enable him to perform the duties of his appointment, and that his contracts for such purpose bind the trust.¹ The cost of expenditures of this nature

¹ *Lehigh Coal & Nav. Co. v. Central R. Co.* 41 N. J. Eq. 167, 35 N. J. Eq. 426; *Fordick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Thomas v. Peoria & R. I. R. Co.* 36 Fed. Rep. 808; *Wood v. Guarantee Trust & Safe Deposit Co.* 128 U. S. 416, 32 L. ed. 472; *Reyburn v. Consumers' Gas Fuel & L. Co.* 29 Fed. Rep. 561; *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606; *Cowdry v. Galveston, H. & H. R. Co.* 1 Woods, 381; *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 34 L. ed. 379; *Kneeland v. Bass Foundry & Mach. Works*, 140 U. S. 592, 35 L. ed. 543; *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 832; *Thornton v. Highland Ave. & B. R. Co.* 94 Ala. 353; *Kerr v. Little*, 39 N. J. Eq. 83; *Beckwith v. Carroll*, 56 Ala. 12; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 437, 29 L. ed. 964; *McIlhenny v. Bins*, 80 Tex. 4; *Securities and Properties Corp. v. Brighton, Alhambra*, 62 L. J. Ch. 566; *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 663. If the mortgagee applies for a receiver the rolling stock rentals are before the mortgage, but the rentals for rolling stock are not preferred to the mortgage where the receiver is not appointed on the application of the mortgagee. *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 34 L. ed. 379, see also, *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632.

The principle has been applied to rentals for rolling stock in addition the cases above cited as follows: *Thomas v. Western Car Co.* 149 U. S. 95, 111, 37 L. ed. 663, 669; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 104, 36 L. ed. 640; *United States Trust Co. v. Wabash W. R. Co.* 150 U. S. 299, 37 L. ed. 1088; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 46 Fed. Rep. 29; *Park v. New York, L. E. & W. R. Co.* 57 Fed. Rep. 808; *New York, P. & A. R. Co. v. New York, L. E. & W. R. Co.* 58 Fed. Rep. 278; and to operating expenses generally, as follows: *Bound v. South Carolina R. Co.* 58 Fed. Rep. 480; *Clyde v. Richmond & D. R. Co.* 56 Fed. Rep. 541; *Finance Co. v. Charleston, C. & O. R. Co.* 48 Fed. Rep. 190; *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* 50 Fed. Rep. 482, 16 L. R. A. 608; *Finance Co. v. Charleston, C. & O. R. Co.* 52 Fed. Rep. 679; *Union Loan & T. Co. v. Southern California Motor Road Co.* 51 Fed. Rep. 107; *Bound v. South Carolina R. Co.* 47 Fed. Rep. 31; *Finance Co. v. Charleston, C. & O. R. Co.* 46 Fed. Rep. 428; *Texas C. R. Co. v. Morgan's Louisiana & T. R. & S. S. Co.* 137 U. S. 199, 34 L. ed. 635; *Ames v. Union P. R. Co.* 60 Fed. Rep. 971.

The rule laid down in the text is confined to railroad receiverships mainly though not exclusively. *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex.

is chargeable first to the net income, and if that be not sufficient then upon the property itself or its proceeds.¹ Expenditures of this nature, however, will not be extended to speculative matters.²

§ 33. Power to continue business.

The power of the court to authorize a receiver, or receiver and manager as he is called in such case in England, to continue the business of the defendant over whose property and business he is appointed, has been recognized, and is supported by authority, independent of the practice as applied to railroad receiverships, and those of statutory origin. The exercise of this power, however, should only be granted in cases where the necessity for so doing is clearly shown.³ There are certain limitations upon this power when applied to the different forms of actions, or objects sought to be accomplished by the proceeding in which the receiver is appointed. Thus in case of a foreclosure of a mortgage unless the mortgage includes the business or good will of the mortgagor, the court will not continue the business through its receiver.⁴ Nor in a matter involving the violation of a contract

109; *Reyburn v. Consumers' Gas Fuel & L. Co.* 29 Fed. Rep. 561; *Securities and Properties Corp. v. Brighton, Alhambra*, 62 L. J. Ch. 566; *Scott v. Nesbitt*, 14 Ves. Jr. 488; *Peck v. Trinsmaran Iron Co.* L. R. 2 Ch. Div. 115; *Makins v. Ibotson* [1891] 1 Ch. 133.

¹ *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606; *Meyer v. Johnston*, 53 Ala. 237; *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 109.

² *Securities and Properties Corp. v. Brighton, Alhambra*, 62 L. J. Ch. 566.

³ As illustrating the growing tendency of recent times to place the management of commercial enterprises under the control of courts of equity it has been stated that not less than one sixth of the railroads of the United States were in the hands of receivers. The functions of courts of equity, in many cases, and especially during panics, are being made to subserve the interests of temporary

delinquents, and thus transforming these courts into commercial agencies. Judicious legislation, or possibly greater judicial caution would prevent the undue haste sometimes manifested to place the management of business concerns, especially corporations, under the fostering care of the courts.

⁴ *Whitley v. Challis* [1892] 1 Ch. 64; *Campbell v. Lloyds, B. & B. Bank* [1891] 1 Ch. 136; *Truman v. Redgrave*, L. R. 18 Ch. Div. 547; *Makins v. Ibotson* [1891] 1 Ch. 133; *Peck v. Trinsmaran Iron Co.* L. R. 2 Ch. Div. 115.

A receiver has no authority unless expressly authorized by the court, or the business is such as to imperatively require him, to open a drug business with the property or moneys in his hands and employ therein his son, who is not a druggist, and run a physician's office in connection therewith. *Terry v. Martin* (N. M.) 32 Pac. 157.

will the court through its receiver set up a new business, or engage in the manufacture of proprietary articles, involving secret formulas.¹ Under the "Companies act" of 1862, which provided that the official liquidator should have power, with the sanction of the court, "to carry on the business of the company, so far as may be necessary for the beneficial winding up of the same," it was held that the word "necessary" as used in the act had sole reference to the "beneficial winding up" of the business of the company, and not with a view of its continuance in business, no matter if the continuance of the business would be beneficial to the shareholders.² And in a partnership matter the purpose of a receiver being to wind up the business, the court will not give the receiver authority to continue the business, except where a serious loss is apparent, growing out of a loss of the good will, or injury to the property, as horses in a livery stable, and then it will only be temporary.³ But there are cases of partnership even, where inevitable loss may result from a refusal to authorize the receiver to carry on the business, where the court owing to the nature of the business will not take upon itself the management.⁴

¹*Merrell v. Pemberton*, 62 Ga. 29.

²*Re Wreck, Recovery, and Salvage Co.* L. R. 15 Ch. Div. 353. Leave to continue the business was ordered in the following cases: *Dayton v. Wilkes*, 17 How. Pr. 510; *Graham v. Graham*, 2 Vict. Rep. 145.

³*Jackson v. DeForest*, 14 How. Pr. 81; *Marten v. Van Schaick*, 4 Paige, 479; *Allen v. Hawley*, 6 Fla. 164; *Heatherton v. Hastings*, 5 Hun, 459; *Henn v. Walsh*, 2 Edw. Ch. 180; *Wolbert v. Harris*, 8 N. J. Eq. 605. It is sometimes necessary for the receiver to complete contracts partially executed. *Taylor v. Neate*, L. R. 89 Ch. Div. 538. See § 85, *supra*. See also *Meridian News & Pub. Co. v. Diem & W. Paper Co.* 70 Miss. 605.

⁴*Waters v. Taylor*, 15 Ves. Jr. 10. In this case the Lord Chancellor (Eldon) said: "Then considering the nature of this property can the plain-

tiff call upon the court to assume the management of the theatre? . . . My opinion is that this court has no jurisdiction to manage this concern merely for the purpose of carrying it on. The court will order it to be sold or foreclosed; will deal with it as property, but no further. . . . I do not see my way to make such an order, and if I did I must, by acting, ruin all concerned. They have still the *locus penitentiae*, and if they will not settle their own interests, it is immaterial, whether the consequences shall be produced by their own acts or by mine." See also *Niemann v. Niemann*, L. R. 43 Ch. Div. 198, where it is held that a receiver will not be appointed over a partnership, and authorized to do acts in the nature of a compromise or settlement which the partners were not authorized to do.

§ 34. Power to sell ; purchaser's title, etc.

(a) The court being in possession of the property through its receiver, for the benefit of the parties who shall ultimately be found to be entitled to it, or to its proceeds, in a proper case has an undoubted right to order a sale of such property and direct the receiver to bring the proceeds into court to await the final order of distribution, and this power with certain limitations extends to both real and personal property. (1) There should in all cases be an order of court of competent jurisdiction directing the sale.¹ (2) The order should particularly describe the property to be sold,² the terms, conditions, and method of sale, and in some states statutes have been passed prescribing the manner and regulating the methods of such sales. As a rule the sale should not be ordered until a final decree is rendered, for until such time it cannot generally be known that a sale will take place,³ and the receiver being in custody of the property will care for and protect it, and if of such nature as to be practicable will collect and preserve the income therefrom. If, however, the property is liable to deterioration and loss,⁴ or, as in the case of insolvency, will eventually have to be sold, the order on a sufficient showing

¹*Ellis v. Little*, 27 Kan. 707. The want of authority of a receiver to transfer a bond is no defense to an obligor in such bond where the transfer is subsequently ratified by the court. *Marine & River Phosphate Min. & Mfg. Co. v. Bradley*, 105 U. S. 175, 26 L. ed. 1034.

The pendency of a bill of exceptions assigning as error the granting of an order authorizing a receiver to sell specified property does not, in the absence of the supersedeas required by law in such case, prevent the hearing and determination of a second application to sell presented by the receiver. *Farmers' Co-Op. Mfg. Co. v. Drake* (Ga.) 22 S. E. 1004.

²*Dizon v. Rutherford*, 26 Ga. 149. Where the order directs the sale of all the property of a defendant and the receiver sells lot 2, being part of it,

the sale is good. *Barron v. Mullin*, 21 Minn. 374.

³*Brush v. Jay*, 113 N. Y. 482; *Esterlund v. Dye*, 56 Ga. 284.

A sale of property by a receiver, in whose hands it has been placed pending a litigation concerning the rights of the parties thereto, may be ordered where the income is insufficient to pay the expenses of the receivership and the corpus is gradually being diminished, although the interests of the parties therein have not been determined. *Smith v. Burton*, 67 Vt. 514.

⁴*National Park Bank v. Goddard*, 131 N. Y. 494, 62 Hun, 31. (The text is sustained by the lower court and not questioned in the upper court.) *First Nat. Bank v. Shedd*, 121 U. S. 74, 30 L. ed. 877; *Crane v. Ford*, Hopk. Ch. 114. And the court may

may be made in an interlocutory proceeding prior to the final decree. The court should however be careful to see that a proper case is presented for the exercise of such power, and to see particularly that the owner of the property cannot be unduly prejudiced by the sale thereof.¹ In case of sale the receiver retains a lien for the unpaid balance of the purchase money.²

(b) The court having power to sell, and having directed the receiver to do so, this carries with it the authority to give the purchaser evidence of the transfer of title. A purchaser under a sale by a receiver having a deed from him is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, in which the receiver of the property was appointed; that the court authorized the receiver to sell; that the sale was made under that authority, and that the sale was confirmed by the court, and that the deed accurately describes the property sold, or interest therein. He is not bound to inquire whether any errors

order part of the property sold to pay taxes where it can be done by reason of its nature and where it is clearly necessary. *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 170.

A receiver of the property of a corporation owning several distilleries whose operation will require the making of contracts for feeding cattle, and the involving of large expense, may be authorized to sell the distillery and hold the proceeds for the benefit of such claims as may be adjudged valid. *Olmstead v. Distilling & C. F. Co.* 73 Fed. Rep. 44.

¹*Forsaith Mach. Co. v. Hope Mills Lumber Co.* 109 N. C. 576. In this case it appeared that the owner of the property was insolvent and that all its property had to be sold to satisfy the numerous debtors who were parties to the action. *Dixon v. Rutherford*, 26 Ga. 149. The court has power to order the sale to be made at not less than a given price. *McIlhenny v. Bins*, 80 Tex. 1.

A receiver making a sale of property under the order of, and subject to approval by the court, cannot recover of a bidder refusing to complete his bid, the loss resulting from a resale by the receiver upon his own motion, where the sale to the first bidder was never approved by the court, and the second sale was so approved and confirmed and completed. *Leslie v. Goodhue*, 69 Hun, 71.

²*Florida v. Anderson*, 91 U. S. 667, 23 L. ed. 290; *State v. Jacksonville, P. & M. R. Co.* 16 Fla. 708.

A receiver who takes possession and makes of sale of property, reserving title until the purchaser has fully paid the purchase money and until confirmation of the sale, may, although actual possession is delivered to the purchaser, maintain an action before confirmation to enjoin interference by an adverse claimant with his possession. *Woodburn v. Smith* (Ga.) 22 S. E. 964.

intervened in the action of the court, or irregularities were committed by the receiver in the sale.¹ Until the confirmation of the sale, however, the receiver is not bound by the sale, the deed issued prior thereto being rendered inoperative if the sale be not confirmed. But after confirmation of the sale all irregularities prior to the execution of the deed are removed.² The order of confirmation is a direct adjudication of the regularity of the action of the receiver,³ and no transfer of title is really made until the order of confirmation is granted, on notice to the parties in interest.⁴ As to the title and condition of the property the rule of *caveat emptor* applies,⁵ and the purchaser takes the property subject to all liens, or outstanding interests therein,⁶ and

¹*Koontz v. Northern Bank*, 88 U. S. 16 Wall. 196, 21 L. ed. 465; *Libby v. Rosekrans*, 55 Barb. 219; *Brande v. Bond*, 68 Wis. 140. A deed made before confirmation is good after the confirmation. *Koontz v. Northern Bank*, *supra*. Before the rights of third parties intervene the court may set aside a sale where the receiver or master deceives the court as to the conditions of sale when the purchaser participates in such deception. *Id.*

Want of notice is ground for refusal to confirm. *Beford v. Mawcatty*, 2 Am. & Eng. Corp. Cas. N. S. 477.

²*Koontz v. Northern Bank*, 88 U. S. 16 Wall. 196, 21 L. ed. 465.

The purchaser of a note at a receiver's sale is not bound by the receiver's statement of the amount due, but is entitled to recover whatever may be due upon it. *Newberry v. Trowbridge*, 18 Mich. 263.

Those who purchased real property taken from citizens during the late war under the plea of their being alien enemies, at sales made by Confederate receivers, obtained thereby no title to it, nor do those claiming under them with notice. The possession of all such persons is tortious and they are liable for rents and profits

and for any damage done to the property while in their possession. *McClure v. McLane*, 39 Tex. 81; *Simmons v. Wood*, 45 How. Pr. 268.

³*Brande v. Bond*, 68 Wis. 140; *Atty. Gen. v. Continental L. Ins. Co.* 94 N. Y. 199.

⁴*Simmons v. Wood*, 45 How. Pr. 262; *Wambaugh v. Gates*, 8 N. Y. 188; *Ex parte Minor*, 11 Ves. Jr. 554; *Twigg v. Fifield*, 18 Ves. Jr. 517; *Thompson v. Gould*, 20 Pick. 185.

⁵*Barron v. Mullin*, 21 Minn. 374; *England v. Clark*, 5 Ill. 486; *Bashore v. Whisler*, 8 Watts, 490; *Fox v. Mensch*, 3 Watts & S. 444; *King v. Gunnison*, 4 Pa. 171.

A purchaser of a railroad in the hands of a receiver, whose contract makes it liable for the obligations of the receiver, is liable to pay a judgment entered against the receiver on a supersedeas bond which he had executed to appeal a judgment against the railroad,—especially where the road was improved and bettered while in the hands of the receiver to an amount in excess of such judgment. *Missouri, K. & T. R. Co. v. Lacy* (Tex. Civ. App.) 35 S. W. 505.

⁶*Fitch v. Wetherbes*, 110 Ill. 475; *Hackensack Water Co. v. DeKay*,

after sale he becomes subject to orders of the court.¹ All sales are subject to the control of the court, and may be set aside for fraud, or mistake.² A receiver ordered to sell will be protected by the court in making such sale.³

(c) The sale of property made by a receiver is not subject to collateral attack.⁴

All persons dealing with a receiver are bound to take notice that he is at all times subject to the orders of court, and that all his acts may be annulled or modified by the court at its pleasure,⁵ and particularly so with reference to sales made by him.⁶

36 N. J. Eq. 548; *Lowry v. Smith*, 9 Hun, 514; *Foster v. Barnes*, 81 Pa. 377; *Lorch v. Aultman*, 75 Ind. 162; *Dann Mfg. Co. v. Parkhurst*, 125 Ind. 817.

¹*Re Denison*, 114 N. Y. 621.

²*Atty. Gen. v. Continental L. Ins. Co.* 94 N. Y. 199; *Hackley v. Draper*, 60 N. Y. 88, 2 Hun, 528.

³*Walling v. Miller*, 108 N. Y. 178.

A purchaser of land at a receiver's sale subject to a mortgage of a specified amount cannot refuse to complete the sale on the ground that such mortgage was payable in gold, without showing that gold coin is of greater value than the other various kinds of money made a legal tender. *Blanch v. Sadlier*, 5 App. Div. 81, 16 16 Misc. 164.

A sale of goods by the receiver of an insolvent vests the title thereto in the purchaser, free from any claim growing out of the indebtedness of the insolvent. *Mississippi Mills v. Bauman* (Tex. Civ. App.) 84 S. W. 661.

⁴*Brande v. Bond*, 68 Wis. 140; *Mellen v. Molins Malleable Iron Works*, 181 U. S. 858, 88 L. ed. 179.

The sale of the property of a corporation by a receiver to shareholders will not be refused on the ground that the corporation attempted to create a

trust, and that such shareholders were responsible for its unlawful conduct, as the court cannot assume that improper use will be made of the property by the purchaser, or undertake to control the use after it is sold and conveyed by the receiver. *Olmstead v. Distilling & O. F. Co.* (C. C. N. D. Ill.) 78 Fed. Rep. 44.

It is incumbent upon a receiver on a motion, contested by creditors, for confirmation of the sale of corporate property, to furnish evidence that a mortgage lien subject to which the sale was made was valid. *Re Wendler Mach. Co.* 2 App. Div. 16, 87 N. Y. Supp. 444.

⁵*Tripp v. Boardman*, 49 Iowa, 410; *Mooney v. British Commercial L. Ins. Co.* 9 Abb. Pr. N. S. 103; *Ellis v. Little*, 27 Kan. 707; but notice must be given to the person whose contract is to be considered. In *Lehigh Coal & Nav. Co. v. Central R. Co.* 35 N. J. Eq. 426, it is said: "Until his contracts are approved or ratified by the court, the court is at liberty to deal with them as to it shall appear to be just, and may either modify them or disregard them entirely." See also *Weeks v. Weeks*, 106 N. Y. 626.

⁶*Hale v. Clauson*, 60 N. Y. 839; *Weeks v. Weeks*, 106 N. Y. 626; and the court has power even in the ab-

§ 35. Power to perform existing contracts ; limitations.

(a) The power to the receiver to carry out contracts existing at the time of his appointment is not, as a rule, granted by the court, except in cases where there is a lien upon the receivership property of some nature operating as a security for the performance of the contract. The reasons for this rule are apparent :

(1) If the receiver could be held to the performance of an uncompleted contract, the performance of the contract by him would be equivalent to a payment or satisfaction of the contract indebtedness, and in the absence of adequate funds for that purpose, the court will not require him to do so.¹ The functions of

sense of fraud to set aside a sale, but the relief is addressed to the sound judicial discretion of the court and no appeal lies from such an order; (*Hazleton v. Wakeman*, 8 How. Pr. 357; *Wakeman v. Price*, 8 N. Y. 384; *Bank of Geneva v. Reynolds*, 33 N. Y. 160; *Dows v. Congdon*, 28 N. Y. 122; *May v. May*, 11 Paige, 201) and in such case it is immaterial that there are grantees and *bona fide* purchasers from the purchaser at such sales. A purchaser at a judicial sale, though a stranger to the judgment or decree, by his purchase, submits himself to the jurisdiction of the court in respect to the sale and purchase and so do all acquiring title from and under him. *Cazet v. Hubbell*, 36 N. Y. 677; *May v. May*, 11 Paige, 201. The court, however, will in all cases indemnify the persons who are effected by a vacation or modification of an order of sale or leasing. *Weeks v. Weeks*, 106 N. Y. 626.

Where a receiver of property, appointed in an action against a corporation, fraudulently obtains an order for the sale of a debt due the corporation, an equitable action, at the suit of the creditor, will lie to vacate the order and set aside a sale made in pursuance thereof. The creditor is not limited to a motion in

the action wherein the receiver was appointed. *Hackley v. Draper*, 60 N. Y. 88.

A private sale of a judgment by a receiver, to one representing judgment creditors, at a grossly inadequate price, will be set aside as fraudulent. It is not necessary in such a case to show fraud on the part of all the parties to the transaction. If the receiver acted fraudulently, this is enough to warrant vacating the sale; and the fact that he took the precaution of obtaining an order of court authorizing him to sell at private sale will not sustain it. *Hackley v. Draper*, 4 Thomp. & C. 614.

The court may correct a mistake made in the computation of the amount of a receiver's sale, when the record and papers furnish all the elements for the correction. *Bryan & Brown Shoes Co. v. Block*, 52 Ark. 458.

¹ *Southern Exp. Co. v. Western N. C. R. Co.* 99 U. S. 191, 25 L. ed. 319; *Central Trust Co. v. Marietta & N. G. R. Co.* 51 Fed. Rep. 15, 16 L. R. A. 90; *Brown v. Warner*, 78 Tex. 543, 11 L. R. A. 394. See *contra*, *Howe v. Harding*, 76 Tex. 17. As to leasehold estates, Mr. Chief Justice Fuller in *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 682, says: "If

the receiver are to marshal the assets and distribute the same to the creditors as directed by the court according to their respective rights and interests.

(2) The receiver in general is but the agent of the court, and is not the agent of the owner of the property for the fulfillment of his contracts, except where he makes the contracts his own by some act of adoption.¹

(3) If the receiver were required to complete the unfinished contract of the owner the effect in many cases would be to make a preference in favor of a simple contract creditor as against a lien holder, and thus change the rights of the parties as they exist at the time of the receiver's appointment.²

(b) The court, however, may order the receiver to complete un-

the order of court under which the receiver acts embraces the leasehold estate it becomes his duty of course to take possession of it. But he does not by taking such possession become assignee of the term in any proper sense of the word. He holds that as he would hold any other personal property for and as the hand of the court and not as the assignee of the term." *Gaither v. Stockbridge*, 67 Md. 222; *Glenny v. Langdon*, 98 U. S. 20, 25 L. ed. 43; *American Fide Co. v. Garrett*, 110 U. S. 288, 28 L. ed. 149; *Sparhawk v. Yerkes*, 143 U. S. 1, 35 L. ed. 915; *Martin v. Black*, 9 Paige, 641; *Com. v. Franklin Ins. Co.* 115 Mass. 278; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Fidelity Safe Deposit & T. Co. v. Armstrong*, 85 Fed. Rep. 566; *Berry v. Gillis*, 17 N. H. 9; *Re Oak Pits Colliery Co.* L. R. 21 Ch. Div. 322.

¹ *Com. v. Franklin Ins. Co.* 115 Mass. 278; *Brown v. Warner*, 78 Tex. 548, 11 L. R. A. 394; *Re Brown*, 8 Edw. Ch. 384; *Turner v. Richardson*, 7 East, 335; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Re Otis*, 101 N. Y. 580; *Sunflower Oil Co. v. Wilson*, 142 U. S. 318, 35 L.

ed. 1025; *Hoyt v. Stoddard*, 2 Allen, 442; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 36 L. ed. 640; *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 37 L. ed. 1085; *Seney v. Wabash Western R. Co.* 150 U. S. 310, 37 L. ed. 1092; *Peoria & P. U. R. Co. v. Chicago, P. & S. W. R. Co.* 127 U. S. 200, 32 L. ed. 110.

² *Olyphant v. St. Louis Ore. & S. Co.* 28 Fed. Rep. 729; *Southern Exp. Co. v. Western North Carolina R. Co.* 99 U. S. 191, 25 L. ed. 819. In this case there was a contract between a railroad company and an express company by which the latter loaned the former a sum of money to be expended in repairing and equipping the road in consideration of the privileges and facilities of express business over the road. Foreclosure proceedings were instituted and a receiver appointed, who refused to perform the contract. A bill for specific performance of the contract was filed by the express company. The court held that a specific performance if decreed would be a form of satisfaction or payment, and declined to grant the relief.

finished contracts if by so doing the interests of all parties will be better conserved, and, in such case, whatever is done by the receiver in the performance of such contracts becomes an obligation upon the receivership and its property to be protected by the court.¹ Even the rights of lien holders may often be promoted by such adoption.

The receiver has no right to impeach or disaffirm the legal and authorized acts of a corporation, as where a corporation had surrendered a note upon which the receiver subsequently brought suit, no fraud or mistake of fact being shown,² for in such a case the receiver is as much bound by the act of the company as the company would be. He may, however, avoid the illegal and unauthorized act of the company.³

§ 36. Power to lease.

(a) It was formerly the law in England that a receiver could not *ex mere motu* lease the premises which he held as receiver. But in this country it is a common practice for the receiver to apply to the court for leave to lease, and frequently power is given in the order of appointment for such purpose. It is not necessary, however, that the order contain such power.⁴ The court may also authorize the leasing of the receivership property beyond the termination of the litigation for the reason that if this power did not exist, and the lease is terminable *ipso facto*, on the termination of the litigation tenants could not be obtained at reasonable

¹ *Olyphant v. St. Louis Ore. & S. Co.* 28 Fed. Rep. 729; *Florence Gas, E. L. & P. Co. v. Hanby*, 101 Ala. 15; *Suydam v. Bank of New Brunswick*, 8 N. J. Eq. 114. But see *Elmira Iron & S. Roll. Mill Co. v. Erie R. Co.* 26 N. J. Eq. 284.

² *Hyde v. Lynde*, 4 N. Y. 887. As to the right of a receiver of a railroad to sever the connection between it and another railroad, for non-payment of the sums agreed to be paid by the latter for the privilege of running over the road,—determined, in a case depending upon particular facts, see *Elmira Iron & S. Roll. Mill Co. v. Erie R. Co.* 26 N. J. Eq. 284.

³ *Leavitt v. Palmer*, 8 N. Y. 19; *Gillet v. Moody*, 8 N. Y. 479; *Brouwer v. Hill*, 1 Sandf. 629. A receiver in a foreclosure proceeding has no power to contract for municipal aid in the construction by him of the unfinished portion of a branch road. *Smith v. McOullough*, 104 U. S. 25. As to the liability of the receiver for work partially completed when appointed and continued by the contractor thereafter until ordered to suspend, see *Gerard L. Ins. A. & T. Co. v. Cooper*, 51 Fed. Rep. 832, 4 U. S. App. 681.

⁴ *Weeks v. Weeks*, 106 N. Y. 626; *McMinville & M. Railroad v. Huggins*, 8 Baxt. 177.

rentals.¹ The term for which the lease may be made in many cases is governed by statute, and, as in England and New York, is governed by rules or general orders, but in the absence of general orders the customary time for which premises of the character under the receivership are usually rented may be a basis upon which to act. It has recently been adjudicated and determined that the power to lease without notice to the parties, is not a jurisdictional defect rendering the order void,² yet it would seem that where the lease runs for a term of years, or any considerable period, notice should be given. As to the length of time for which a receiver may lease without an order of court, general or special, there seem to be no well considered cases, though Daniel's Chancery Pleading and Practice says he may "lease for a year certain, or less, or for any term not exceeding three years."³

In case of a railroad company where no power exists in the corporation to lease its property it is evident no power exists in its receiver to lease,⁴ and all improvements made by such a lessee are at his own risk.

(b) An important question has frequently arisen as to the power of the receiver to cancel a lease partially expired at the time of his appointment. The ordinary chancery receiver is clothed with no estate in the property but is a mere custodian of it for the court, and where the order of court embraces a leasehold estate it be-

¹*Shreve v. Hawkinson*, 84 N. J. Eq. 418; *Weeks v. Weeks*, 106 N. Y. 626.

²*Weeks v. Weeks*, 106 N. Y. 626.

³2 Daniel's C. P. & P. p. 1750. The case upon which Mr. Daniel relies for this statement was decided in Chambers and does not seem to have been reported, so that for the facts upon which it is based or the precedents relied upon, if any, we have no information. Lord Thurlow in *Wynne v. Newborough*, 1 Ves. Jr. 164, said: "I do not know how to make a distinction between leases for one year and others," and held the receiver could not lease for one year without application to the master.

The Irish rule seems to have been

to lease for seven years or pending the suit. *Buckworth v. Morgan*, Smith on Recrs. (Irish) 82.

See further as to authority to lease without order, *Neale v. Bealing*, 3 Swanst. 304; *Morris v. Elme*, 1 Ves. Jr. 139; *Stooby v. Dickon*, 5 Sim. 631; *Roberts v. Armstrong*, 2 Moll. 352; or leave of master, *Duffield v. Elwes*, 11 Beav. 590; ——— v. *Lindsey*, 15 Ves. Jr. 91.

⁴*State v. McMinneville & M. R. Co.* 6 Lea, 369; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 30, 15 L. ed. 27; *McMinneville & M. Railroad v. Huggins*, 3 Baxt. 177.

comes the duty of the receiver to take possession of it, but he does not by such possession become assignee of the term.¹ The court does not bind itself or its receiver *eo instanti* by the mere act of taking possession of the leasehold property. After taking possession of such property the receiver is entitled to a reasonable time in which to ascertain the situation of affairs and determine whether it will be advantageous to the parties in interest, or the estate, for him to retain and use the leasehold property.² In all such cases the receiver should act with reasonable promptness, and in the meantime do no act that may be construed as an adoption of the lease.³ A receiver is not bound to accept property of

¹*Gaither v. Stockbridge*, 67 Md. 222; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632.

Receivers who take possession of cars held by an insolvent railroad company under a lease, with full authority to do so, and operate the cars with full knowledge of the lease and the burdens assumed by the company, are bound by the lease as assignees of the company. *Easton v. Houston & T. C. R. Co.* 88 Fed. Rep. 784.

²*St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 36 L. ed. 640; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 630; *Turner v. Richardson*, 7 East, 335; *Broome v. Robinson*, cited in 7 East, 339; *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 322, 35 L. ed. 1025, 1028; *Com. v. Franklin Ins. Co.* 115 Mass. 278; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. ed. 915; *New York, P. & O. Co. v. New York, L. E. & W. R. Co.* 58 Fed. Rep. 268; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 58 Fed. Rep. 257; *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 37 L. ed. 1085; *Seney v. Wabash Western R. Co.* 150 U. S. 310, 37 L. ed. 1092; *Gaither v. Stockbridge*, 67 Md. 222. But see *People v. Universal L. Ins. Co.* 80 Hun, 142.

³What acts of the receiver may be

construed as an acceptance of the lease must, in the very nature of things, be determined from the circumstances surrounding each particular case, and is often a question of much difficulty. In the matter of assignees in bankruptcy where the same rules apply, it has been held, that advertising the leasehold for sale with a view of ascertaining its value is not an adoption, but it would be if a bid were accepted. Lord Ellenborough, in *Turner v. Richardson*, 7 East, 335; or if at the sale the assignee bid in the property, *Hastings v. Wilson*, Holt, N. P. 290; or conveyed it, *Page v. Golden*, 2 Stark. 309. As to what would be a reasonable time in which to make the election, see *Ex parte Fletcher*, 1 Deac. & Ch. 318; *Ex parte Scott*, 1 Rose, 446, note; *Ex parte Blandy*, 1 Deac. 286.

The general rule as to what constitutes an acceptance of a lease by an assignee in bankruptcy is stated by Ch. J. Fuller in *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 99, 36 L. ed. 632, 638, as follows: "If, however, they accepted a bidding, or dealt with the estate as their own, or used it in a manner injurious to the persons otherwise entitled, they are not within this protection." The same doctrine is held in *Glenny v. Langdon*,

an onerous and unprofitable nature which would be a burden instead of a benefit to the estate.¹

A claim of the lessor for rent accruing before the receivership is not entitled to priority over lien creditors. It is an unsecured liability and must rank along with all other claims of the same class on final distribution of the assets.²

98 U. S. 20, 25 L. ed. 43; *American File Co. v. Garrett*, 110 U. S. 288, 28 L. ed. 149; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. ed. 915; *Martin v. Black*, 9 Paige, 641; *Com. v. Franklin Ins. Co.*, 115 Mass. 278; *Berry v. Gillis*, 17 N. H. 9; *Hoyt v. Stoddard*, 2 Allen, 442.

In *Re Oak Pits Colliery Co. L. R.* 21 Ch. Div. 822, Lord Justice Lindley, under the "Companies Act," stated the English rule upon this subject as follows: (1) "If the liquidator has retained possession for the purposes of winding up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding up. . . . (2) But if he has kept possession by an arrangement with the landlord and for his benefit as well as for the benefit of the company and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain. . . . When the liquidator retains the property for the purposes of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt constructed for the purpose of winding up the company and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose, and in such a case it appears to us that the

rent for the whole period during which the property is so retained, or used, ought to be paid in full without reference to the amount which could be realized by a distress. . . . But no authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding up when the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee. If the landlord had endeavored to reënter and the liquidator had objected, the case might be different."

¹*Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. ed. 915; *Glenny v. Langdon*, 98 U. S. 20, 25 L. ed. 43; *American File Co. v. Garrett*, 110 U. S. 288, 28 L. ed. 149. This species of unprofitable property is termed by Lord Kenyon *damnosa hereditas*, cited in 7 East, 842. *Weeks v. Weeks*, 106 N. Y. 626; *McMinville & M. Railroad v. Huggins*, 8 Baxt. 177; *Shreve v. Hankinson*, 84 N. J. Eq. 418; *Weeks v. Weeks*, 106 N. Y. 626.

²*Huidskoper v. Hinckley Locomotive Works*, 99 U. S. 258, 25 L. ed. 344; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 470, 29 L. ed. 975; *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 663; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.* 58 Fed. Rep. 268.

§ 37. Power over property in foreign jurisdiction.

It is exceedingly difficult to reach a proper solution of this question separate and distinct from the cognate question relating to the receiver's right to sue in foreign jurisdictions in which form the rights of the receiver and his power over such property have usually been discussed. It will not be attempted therefore, in this connection, to touch upon the subject except in a brief way.¹

It has been the practice in the courts of chancery of England for perhaps a century and a half to appoint receivers for the purpose of collecting in the effects of persons, and decedent's estates, situated in foreign countries.² Sometimes the practice was to appoint a receiver resident in the foreign country where the assets were situated, and sometimes to appoint as receiver a resident of England with power to appoint a foreign agent through whom the business was transacted.³ And the same thing has been done in this country, but, owing to the great variety of decisions, and apparent conflict between many of them, growing out of the technical rules of practice relating to parties authorized to sue as well as the relative rights of citizenship in the different states and the remedies applicable to such relationship the law has been subject to great confusion. Much of this confusion has arisen from the mistaken idea that the title to the property over which the receiver is appointed is vested in the receiver *eo instanti* on the date of the order, as in bankruptcy and many insolvency proceedings where by deeds of assignment the title to property is vested in the assignee.

(a) ENGLISH RULE.

The following propositions may be considered as established in England :

- (1) A valid transfer of personal property according to the laws of the place of residence is valid everywhere and will be enforced.
- (2) The same rules apply to transfers of personal property

¹See Chap. vi.

²*Drenory v. Darwin*, May 20, 1765, cited in 24 L. J. Ch. 121; *Hinton v. Galli*, 24 L. J. Ch. 121, 2 Eq. 479.

³*Cockburn v. Raphael*, 2 Sim. & Stu. 453; ——— *v. Lindsey*, 15 Ves. Jr. 91.

under bankruptcy and insolvency proceedings and by analogy to receiverships.

(3) That there is no distinction between the transfer of such property by voluntary act of the owner and by operation of law so far as the effects regarding title are concerned.

(4) That the title to personal property in a foreign jurisdiction will be protected in the assignee as against an English creditor.

(5) That as to a foreign creditor not subject to English laws he will be permitted to retain property acquired under attachment subsequent to the assignment where the local laws confer upon him an absolute title.¹

(b) AMERICAN RULE.

The doctrine of American courts is almost diametrically opposite that of the English courts in some respects, and may be summarized as follows:

(1) As to the disposition of personal property the law of the domicile of the owner governs the transfer and if valid at his place of domicile the transfer is valid everywhere, except where the local law makes a preference in favor of its own citizens.

(2) As to the disposition of personal property by operation of law as in receiverships, the law being local has no extra territorial effect so far as the title is concerned. In such cases the assignee takes the property subject to every equity of foreign creditors, and subject to all remedies of foreign countries.

(3) As between the different states in this country there has

¹A full and a very elaborate opinion with an exhaustive review of English and other foreign authorities upon this question is given by Chancellor Kent in *Holmes v. Remsen*, 4 Johns. Ch. 460, 20 Johns. 229, and the authorities upon the question will not be repeated in the connection. See also 2 Bell's Com. 7th ed. by McLaren p. 568 [680]; and a review of all the authorities both English and American in Story's Conf. of Laws, 8th ed. §§ 404-416; *Goodwin v. Jones*, 8 Mass. 517. And see *Sill v. Worwick*, 1 H. Bl. 690; *Hunter v. Potts*, 4 T. R. 182; *Phillips v. Hunter*, 2 H. Bl. 402;

Holmes v. Remsen, 4 Johns. Ch. 460; *Wilson's Case*, cited in 1 H. Bl. 691; *Solomons v. Ross*, 1 H. Bl. 181, note, 691; *Jollet v. Deponthieu*, 1 H. Bl. 182, note, 691; *Neale v. Cottingham*, 1 H. Bl. 182, note; *Royal Bank of Scotland v. Outhbert (Stein's Case)*, 1 Rose Bank Cases, Appx. 472, 2 Rose Bank Cases, 78; *Smith v. Buchanan*, 1 East, 6.

The foregoing cases are principally bankrupt cases but involve the same principle involved in receivership matters. *Booth v. Clark*, 58 U. S. 17 How. 822, 15 L. ed. 164.

grown up a species of comity, founded upon the doctrine of reciprocity, by means of which foreign assignments and receiverships are recognized and enforced except where the rights of the citizens of the state where such foreign assignment is sought to be enforced are prejudiced. In other words, where the foreign law comes in conflict with the law of the forum the latter prevails. This doctrine is based upon principle, *inter alia*, that where a foreign citizen places his property under the protection of another state he voluntarily submits such property to the remedies that state gives to its citizens. The rule is: *Quatenus sine prejudicio indulgentium fieri potest.*¹

¹*Booth v. Clark*, 58 U. S. 17 How. 323, 15 L. ed. 164; *Blake v. Williams*, 6 Pick. 286; *Tully v. Herrin*, 44 Miss. 626; *Very v. McHenry*, 29 Me. 208; *Oliver v. Townes*, 2 Mart. N. S. 98; *Frazier v. Fredericks*, 24 N. J. L. 162; *Milne v. Moreton*, 6 Binn. 353; *Woodward v. Roane*, 23 Ark. 526; *Speed v. May*, 17 Pa. 91; *Law v. Mills*, 18 Pa. 185; *Saunders v. Williams*, 5 N. H. 213; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; *Wallace v. Patterson*, 2 Harr. & McH. 463.

The law of New York is most ably reviewed in the late case of *Re Waile*, 99 N. Y. 433, by Mr. Justice Earl, and the following propositions established as the law of that state:

"(1) The statutes of foreign states can have in no case any force or effect in this state *ex proprio vigore* and hence the statutory title of foreign assignees in bankruptcy can have no recognition here, solely by virtue of the foreign statute.

(2) But the comity of nations which Judge Denio in *Petersen v. Chemical Bank*, 32 N. Y. 21, said is a part of the common law allows a certain effect here to titles derived under, and powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced here when

they can be without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided also that such titles are not in conflict with the laws or public policy of our state.

(3) Such foreign assignees can appear, and subject to the conditions above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with or withheld the property of the bankrupt." The following cases are cited as sustaining the propositions above laid down: *Peterson v. Chemical Bank*, 32 N. Y. 21; *Kelly v. Crapo*, 45 N. Y. 86; *Osgood v. Maguire*, 61 N. Y. 524; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Re Bristol*, 16 Abb. Pr. 184; *Runk v. St. John*, 29 Barb. 585; *Barclay v. Quicksilver Min. Co.* 6 Lans. 25; *Hoopes v. Tuckerman*, 3 Sandf. 311; *Olyphant v. Atwood*, 4 Bosw. 459; *Hunt v. Jackson*, 5 Blatchf. 349. See also *Humphreys v. Hopkins*, 81 Cal. 551, 6 L. R. A. 792; *State Bank v. First Nat Bank*, 34 N. J. Eq. 450; *Farmers' & M. Ins. Co. v. Needles*, 52 Mo. 17; *Kronberg v. Elder*, 18 Kan. 150; *Moseby v. Burrow*, 52 Tex. 396; *Hunt v. Columbian Ins. Co.* 55 Me. 290; *Filkins v. Nunna*

§ 38. Power to impeach fraudulent acts of debtor.

A court of chancery has no inherent power to invest a receiver with authority to impeach a sale that is fraudulent as to creditors.

macher, 81 Wis. 91; *McClure v. Campbell*, 71 Wis. 350; *Taylor v. Boardman*, 25 Vt. 581; *Crapo v. Kelly*, 88 U. S. 16 Wall. 610, 21 L. ed. 480; *Waters v. Barton*, 1 Coldw. 450; *Pond v. Cooke*, 45 Conn. 126; *Cagill v. Wooldridge*, 8 Baxt. 580; *McAlpin v. Jones*, 10 La. Ann. 552; *Singerly v. Fox*, 75 Pa. 114; *Comstock v. Frederickson*, 51 Minn. 350.

Chief Justice Mitchell in *Catlin v. Wilcox Silver Plate Co.* 123 Ind. 477, 8 L. R. A. 62, states the law upon this subject as follows:

(1) The rule may be considered as established that a receiver may invoke the aid of a foreign court in obtaining possession of property or funds within its jurisdiction to which he is entitled, but aid will only be extended as against those who were parties to, or in some way in privity with, the proceedings in the course of which his appointment was made, or who are in possession of the property or fund to which the receiver has a right, and not against creditors of a nonresident debtor, who are seeking to subject the property or fund to the payment of their debts, by proceedings only instituted for that purpose.

Hurd v. Elizabeth, 41 N. J. L. 1; *Runk v. St. John*, 29 Barb. 585; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291; *Lycorning F. Ins. Co. v. Wright*, 55 Vt. 526; *Thurston v. Rosenfield*, 42 Mo. 474; *Willits v. Waite*, 25 N. Y. 577.

(2) It follows, hence, that the available legal authority of a receiver is co-extensive only with the jurisdiction of the court by which he was appointed

when the right of precedence or priority of creditors is asserted in respect to property or funds of a non-resident debtor, which the receiver has not yet reduced to possession.

Hunt v. Columbian Ins. Co. 55 Me. 290; *Warren v. Union Nat. Bank*, 7 Phila. 156; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201; *Farmers' & M. Ins. Co. v. Needles*, 53 Mo. 17; *Taylor v. Columbian Ins. Co.* 14 Allen, 853.

(3) It is of course well settled that personal property is transferable according to the law of the owner's domicile, and that a voluntary assignment or transfer made without compulsion or legal coercion is to be governed everywhere by that law, unless the contract by which the transfer was made is limited or restrained by some positive enactment of the state in which the property is situate or unless it affects citizens of the latter state injuriously.

Ames Iron Works v. Warren, 76 Ind. 512; *Martin v. Potter*, 11 Gray, 37; *Weider v. Maddox*, 66 Tex. 372; *Warner v. Jaffray*, 96 N. Y. 248; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 139, 19 L. ed. 109; *Askew v. La Cygne Exch. Bank*, 88 Mo. 366; *Lau v. Mills*, 18 Pa. 185; *Lowry v. Hall*, 2 Watts & S. 129; *Smith's Appeal*, 104 Pa. 381; *Chafee v. Fourth Nat. Bank*, 71 Me. 514; *Guillander v. Howell*, 35 N. Y. 657; *Faulkner v. Hyman*, 142 Mass. 58; *Moore v. Church*, 70 Iowa, 208; *Re Waite*, 99 N. Y. 433.

(4) Property in a foreign state that has passed from an assignor to an

As a rule the ordinary receiver *pendente lite* in case of corporations is regarded as representing the corporate body itself and not

assignee by a voluntary deed, and not by proceedings *in invitum* by process of law, is distinguished from like property in the hands of a receiver by operation of law, or by an assignment made under legal compulsion. Assignments of the latter class are held inoperative upon property not situate within the territory over which the laws that make, or compel its debtor to make them, have dominion.

Rhawn v. Pearce, 110 Ill. 850; *Smith's Appeal*, 104 Pa. 381; *Walters v. Whitlock*, 9 Fla. 86.

(5) The principles of comity in favor of a foreign receiver in obtaining possession of a fund are not only suspended as against a citizen of the state where the property is situate, but also as against nonresident creditors of states other than that of the debtor. There are some cases that hold that if the receiver reduces the property to his possession then in such case his possession will be protected in a foreign jurisdiction, provided the property is in the foreign jurisdiction for a lawful purpose.

Cf. Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co., 108 Ill. 317; *Cagill v. Wooldridge*, 8 Baxt. 580; *Killmer v. Hobart*, 58 How. Pr. 452; *Pond v. Cooke*, 45 Conn. 126; *Cook v. Orange*, 48 Conn. 401; *Blake Crusher Co. v. New Haven*, 46 Conn. 473. *Contra, Humphreys v. Hopkins*, 81 Cal. 557, 6 L. R. A. 792.

But not so where the property is in a foreign jurisdiction for an illegal purpose.

Dick v. Bailey, 2 La. Ann. 974.

Where a receiver was appointed in New York, and a general assignment was made to him by the debtor, the receiver was permitted to file a bill in

Michigan to foreclose a mortgage not strictly as receiver, but as assignee. *Graydon v. Church*, 7 Mich. 86.

As to the receiver's right to sue in a foreign jurisdiction it has been held that he has no such right in the following cases:

Hope Mut. L. Ins. Co. v. Taylor, 2 Robt. 278; *Kronberg v. Elder*, 18 Kan. 150; *Commercial Nat. Bank v. Motherwell Iron & S. Co.* 95 Tenn. 172, 29 L. R. A. 164; *Farmers' & M. Ins. Co. v. Needles*, 52 Mo. 17; *Brigham v. Ludington*, 12 Blatchf. 237; *Hazard v. Durant*, 19 Fed. Rep. 471; *Olney v. Tanner*, 21 Blatchf. 540; *Day v. Postal Teleg. Co.* 66 Md. 354; *Burlett v. Wilbur*, 53 Md. 485; *Filkins v. Nunnenmacher*, 81 Wis. 91; *McClure v. Campbell*, 71 Wis. 350; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164. This case is the authority for holding that a receiver has no right to sue in a foreign jurisdiction, on which most of the foregoing cases are based. It was not the law in England when decided [1854], and had not been since the case of *Falliott v. Ogden*, 1 H. Bl. 123 (1789); nor was it the law of continental Europe. The doctrine had been condemned in *Holmes v. Remsen*, 4 Johns. Ch. 460, by Chancellor Kent, and is at variance with the following later cases:

Boulware v. Davis, 90 Ala. 207, 9 L. R. A. 601; *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 174; *Wilkinson v. Culver*, 23 Blatchf. 416; *McAlpin v. Jones*, 10 La. Ann. 552; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Iglehart v. Bierce*, 36 Ill. 138; *Graydon v. Church*, 7 Mich. 86; *Hunt v. Columbian Ins. Co.* 55 Me. 290; *Hurd v. Elizabeth*, 41 N. J. L. 1; *Chafes v. Quidnick Co.* 13 R. I. 442;

its creditors or shareholders. He derives his power under and through it, and for the purposes of litigation he takes only the rights of the corporation such as could be asserted in its own name.¹ But in other cases by virtue of statutory provisions the

Paine v. Lester, 44 Conn. 196; *Cooke v. Orange*, 48 Conn. 401; *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 174; *Bidlack v. Mason*, 26 N. J. Eq. 280; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *Meizner v. Bauer*, 98 Ind. 427; *Runk v. St. John*, 29 Barb. 585; *Milne v. Moreton*, 6 Binn. 353; *Barclay v. Quicksilver Min. Co.* 6 Lans. 25; *Pugh v. Hurtt*, 52 How. Pr. 22; *Dyer v. Power*, 39 N. Y. S. R. 186; *Peters v. Foster*, 56 Hun. 607; *New Jersey Protection & L. Bank v. Thorp*, 6 Cow. 46; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.* 123 N. Y. 37; *Woodward v. Brooks*, 128 Ill. 222, 8 L. R. A. 702; *Rhawn v. Pearce*, 110 Ill. 350; *Sercomb v. Catlin*, 128 Ill. 556.

"The course of modern adjudications," says Pinney, J., in *Gilman v. Ketcham*, 84 Wis. 60, 23 L. R. A. 52, "is in favor of a liberal extension of interstate comity, and against a narrow and provincial policy, which would deny proper effect to judicial decisions of sister states under their statutes, and rights claimed under them simply because technically they are foreign and not domestic."

For an instructive case on the law of international comity, see *Hilton v. Guyot*, 159 U. S. 113.

As showing the power of the court over property in a foreign jurisdiction where it has jurisdiction over the parties, see *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538; *Sercomb v. Catlin*, 128 Ill. 556; *Alexander v. Tolleston Club*, 110 Ill. 65.

A foreign receiver of a foreign corporation, appointed at the place of its domicile to whom all its assets have

been assigned, has been allowed to intervene in Massachusetts and be heard in a proceeding to appoint a receiver in that state. *Buxwell v. Supreme Sitting O. of I. H.* 161 Mass. 224. But see *Fawcett v. Supreme Sitting O. of I. H.* 64 Conn. 170, 24 L. R. A. 815. A receiver of one state will be appointed over a railroad extending into another state by the court of the latter state on grounds of comity. *Port Royal & A. R. Co. v. King*, 93 Ga. 68, 24 L. R. A. 730. To the same effect is *Baldwin v. Hosmer*, 101 Mich. 432.

A careful examination of the foregoing cases, taking into consideration the tendency and broader liberality of our modern courts, and the increasing laxity in the application of the doctrine of *stare decisis*—now becoming a relic of the past—it is believed will establish the following propositions so far as personal property in a foreign jurisdiction is concerned:

(1) The distinction between a voluntary transfer and a transfer by operation of law is a mere legal fiction.

(2) A recognition of the rights of a foreign receiver co-extensive with the recognized rights of the person or corporation over whose property he is appointed is conducive to the best interests of interstate and international commercial relations, and is in harmony with the fundamental principles of our government, promoting as it does due and proper respect between the courts of the several states.

¹*Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 828; *Hyde v. Lynde*, 4 N. Y. 387; *Higgins v. Gillesheimer*, 26 N. J. Eq. 308. In this case

receiver may, as the representative of creditors, disaffirm and impeach the fraudulent acts of the insolvent debtor or corporation.¹ This is especially so in an action brought to wind up an insolvent corporation, in which case the receiver, represents the interests of creditors rather than the dead corporation.² The receiver may also disaffirm the unlawful acts of a corporation, as where dividends have been declared in favor of stockholders of an insolvent corporation in violation of a statute.³

the Vice Chancellor says: "The question in this case is, has the complainant as receiver a right to have them nullified? In the absence of a statutory provision a receiver is a mere instrument, or arm of the court, by which he holds the property in dispute for safe keeping and preservation; he is not invested with the legal title; he acts or refrains as the court directs; he is so purely the creature of the court that the property he holds is esteemed to be *in custodia legis*. . . . It is clear therefore that unless the statute authorizing complainant's appointment as receiver confers upon him the right to maintain this action he cannot maintain it. His right to appear here as a sutor to impeach these conveyances must appear in the law authorizing his appointment, or he has no such right." See also *Seymour v. Wilson*, 16 Barb. 294; *Green v. Hicks*, 1 Barb. Ch. 309; *Dorr v. Noxon*, 5 How. Pr. 29; *Foster v. Townshend*, 12 Abb. Pr. N. S. 469; *Coope v. Bowles*, 42 Barb. 87; *Hyde v. Lynde*, 4 N. Y. 887; *Piscataqua F. & M. Ins. Co. v. Hill*, 60 Me. 178; *Kennebec & P. R. R. Co. v. Portland & R. R. Co.* 54 Me. 181; *Brewer v. Boston Theatre Proprs.* 104 Mass. 378; *Re Duckworth*, L. R. 2 Ch. App. Cas. 577; *Leifchild's Case*, L. R. 1 Eq. 231.

¹*Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46; *Vail v. Hamilton*, 85 N. Y. 453; *Atty. Gen. v. Guardian Mut. L. Ins. Co.*, 77 N. Y.

272; *Underwood v. Sutcliffe*, 77 N. Y. 62; *Bostwick v. Menck*, 40 N. Y. 333; *Gillett v. Phillips*, 13 N. Y. 114; *Tuckerman v. Brown*, 33 N. Y. 297; *Curtis v. Leavitt*, 15 N. Y. 44; *Porter v. Williams*, 9 N. Y. 142; *Talmage v. Pell*, 7 N. Y. 347; *Gillet v. Moody*, 3 N. Y. 474; *Mann v. Pentz*, 3 N. Y. 415; *Van Cott v. Van Brunt*, 2 Abb. N. C. 283, 83 N. Y. 535; *Libby v. Rosekrans*, 55 Barb. 217; *Osgood v. Laytin*, 48 Barb. 464, 5 Abb. Pr. N. S. 9; *Barton v. Hosner*, 24 Hun, 469; *Butterworth v. O'Brien*, 24 How. Pr. 438; *Manley v. Rassiga*, 13 Hun, 288; *Osgood v. Ogden*, 4 Keyes, 70; *Brouwer v. Appleby*, 1 Sandf. 158; *Brouwer v. Hill*, 1 Sandf. 629; *Hoyt v. Thompson*, 3 Sandf. 416; *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815; *Runyon v. Farmers' & M. Bank*, 4 N. J. Eq. 480; *Monitor Furnace Co. v. Peters*, 40 Ohio St. 575; *Gill v. Balis*, 72 Mo. 424; *Alexander v. Relfe*, 74 Mo. 495; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; but see *Atchison v. Davidson*, 2 Pinney, 48; *Hamlin v. Wright*, 23 Wis. 492.

²*United States v. Church of Jesus Christ of L. D. S.* 5 Utah, 538; *Re Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Orandall v. Lincoln*, 52 Conn. 73. And see further Corporations.

³*Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Osgood v. Laytin*, 48 Barb. 464, Affirmed in 3 Keyes, 521.

§ 39. Power to collect unpaid stock subscriptions.

A receiver of an insolvent corporation being appointed to administer the whole estate so far as it is liable for the payment of its debts has power to enforce payment of arrearages of stockholders for unpaid stock, such arrearages being properly liable for the payment of the corporation debts.¹ In a proceeding to

In *Kennedy v. Thorp*, 51 N. Y. 174, it was held that where a vendor from whom goods had been fraudulently obtained brings suit on the contract and prosecutes it to judgment, neither the vendor or his receiver appointed in supplementary proceedings based on such judgment can set up fraud in the sale.

In *Olney v. Tanner*, 10 Fed. Rep. 101, affirmed in 18 Fed. Rep. 636, it was held that a receiver appointed in supplementary proceedings is not vested by virtue of his appointment with the title of property fraudulently conveyed by the debtor. The court appointing him cannot put him in possession of such property. It will not authorize his meddling with it nor protect him if he does so. But he may assail the fraudulent transaction by a suit for that purpose to the extent a creditor might do and not otherwise and recover to the extent such creditor might recover. *Bostwick v. Menck*, 40 N. Y. 883; *Brown v. Gilmore*, 16 How. Pr. 527; *Field v. Sands*, 8 Bosw. 685. And in such case if an assignee in bankruptcy of the debtor has been appointed he alone can file a bill to set aside the fraudulent conveyance. *Olney v. Tanner*, 18 Fed. Rep. 636; Cf. *Teller v. Randall*, 40 Barb. 242; *Becker v. Torrance*, 31 N. Y. 637; *Miller v. MacKenzie*, 29 N. J. Eq. 292. But see *Higgins v. Gillesheimer*, 26 N. J. Eq. 308; *Purker v. Browning*, 8 Paige, 888. A receiver has power to obtain possession and control of assets

retained and concealed by the officers of a corporation. *Brandt v. Allen*, 76 Iowa, 50, 1 L. R. A. 653, and in such case defendants will not be heard to say that the assets are not needed for the payment of the lawful debts of the company. *McCarty's Appeal*, 110 Pa. 879.

¹*Heman v. Britton*, 88 Mo. 549; *Shoemaker v. Laredo Improv. Co.* 83 Tex. 162; *Pente v. Hawley*, 1 Barb. Ch. 122; *Calkins v. Atkinson*, 2 Lans. 12; *Farmers' & M. Bank v. Jenks*, 7 Met. 592; *Rankins v. Elliott*, 16 N. Y. 377. And suit may be collectively or individually against the shareholders. *Van Wagoner v. Clark*, 22 Hun, 497. And in some states may make assessments as in mutual insurance companies. *Tobey v. Russell*, 9 R. I. 58; *Embree v. Shideler*, 36 Ind. 423; *McDonald v. Ross-Lewin*, 29 Hun, 87; *Sands v. Sanders*, 28 N. Y. 416; *Jackson v. Roberts*, 31 N. Y. 304; *Downs v. Hammond*, 47 Ind. 181; *Frank v. Morrison*, 58 Md. 423; *Stillman v. Dougherty*, 44 Md. 380; *Elderkin v. Peterson*, 8 Wash. 674; *Great Western Teleg. Co. v. Gray*, 122 Ill. 680; *Clark v. Thomas*, 34 Ohio St. 46; *Merchants' Nat. Bank v. Northwestern Mfg. & Car Co.* 48 Minn. 361; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Stewart v. Lay*, 45 Iowa, 604; *Gaslight & Bkg. Co. v. Haynes*, 7 La. Ann. 114; *New Orleans Gaslight Co. v. Bennett*, 6 La. Ann. 457; *Stark v. Burke*, 5 La. Ann. 740.

A receiver in ordinary creditors'

recover unpaid stock in a banking corporation the receiver may proceed in equity, he being the representative of the creditors, not on the ground of there being no legal remedy, but upon the ground that the statute gives a new remedy for a new state of things, and in such a proceeding the shareholder is not at liberty to urge, as a defense, that he is deprived of a trial by jury, for the reason that in accepting the franchises of the corporation the shareholder voluntarily subjected himself to the terms and conditions accompanying such franchises.¹ He may also proceed against a bank director to recover a penalty incurred for illegally paying out a portion of the stock of the bank, and, by statute, may sue in his own name.² But it has been held in a recent case that the power of a receiver to institute proceedings against the stockholders of an insolvent corporation to set aside the transactions by which unpaid stock was surrendered and paid up stock issued in lieu thereof, was derived solely from statutory authority, and in the absence of such statutory power the receiver could not proceed.³

suits has no power to enforce the stock liability of shareholders. *Mann v. Pentz*, 3 N. Y. 415. Nor has he in a proceeding brought by him to enforce stock liability, where he represents the corporation and the shareholders and not the creditors. *Billings v. Robinson*, 28 Hun, 122, affirmed in 94 N. Y. 415; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 328. But see *Great Western Teleg. Co. v. Gray*, 122 Ill. 630.

¹*Sagory v. DuBois*, 3 Sandf. Ch. *466.

As to the right of the receiver to enforce stock subscriptions see generally: Illinois: *Great Western Teleg. Co. v. Gray*, 122 Ill. 630.

Iowa: *Stewart v. Lay*, 45 Iowa, 604.

Louisiana: *Gaslight & Bkg. Co. v. Haynes*, 7 La. Ann. 114.

Maryland: *Frank v. Morrison*, 58 Md. 423.

Minnesota: *Merchants' Nat. Bank v. Northwestern Mfg. & Car Co.* 48 Minn. 361.

New York: *Mann v. Pentz*, 3 N. Y. 415; *Billings v. Robinson*, 28 Hun, 122.

Ohio: *Clarke v. Thomas*, 34 Ohio St. 46.

Washington: *Elderkin v. Peterson*, 8 Wash. 674.

²*Bank of Niagara v. Johnson*, 8 Wend. 645.

³*Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 328. Prior to the adoption of the New York Code it was necessary to enforce such liability by a bill filed in behalf of all the creditors against the corporation, making all the stockholders also defendants. *Mann v. Pentz*, 3 N. Y. 415, reversing 2 Sandf. Ch. 257; *Wallace v. Milligan*, 110 Ind. 498. As to the rule in Louisiana see *Gaslight & Bkg. Co. v. Haynes*, 7 La. Ann. 114; *New Orleans Gaslight Co. v. Bennett*, 6 La. Ann. 457; *Stark v. Burke*, 5 La. Ann. 740.

See this subject further under title Corporations.

§ 40. Power to issue certificates.

As we have seen the receiver has power in case of a railroad corporation to pay operating expenses under the direction of the court, and he may issue certificates therefor to such an amount as the court may direct, but he has no right to divert the funds derived from the road to other purposes than those considered and passed upon by the court.¹ Where certificates were authorized for a certain amount, the proceeds to be used in defraying operating expenses, and certificates were issued beyond that amount and the proceeds were used in paying coupons due on the bonds of the road, such certificates are void even in the hands of innocent holders, but the *bona fide* holders of such certificates should be subrogated to the rights of the holders of such coupons as had been paid from the money arising from the sale of the void certificates.² For further consideration of this subject see Receiver's Certificates.

§ 41. Power to appeal.

Ordinarily a receiver has no power to appeal from an order directing him to turn over property in his hands, but when the order erroneously directs him to turn over more than he has he may appeal from such order.³ In a matter in which he is a party

As to what defenses may or may not be interposed to actions brought by receivers to recover unpaid subscriptions see *Shoonover v. Hinckley*, 48 Iowa, 82; *Stewart v. Lay*, 45 Iowa, 604; *Great Western Teleg. Co. v. Gray*, 123 Ill. 690; *Lamar Ins. Co. v. Gulick*, 102 Ill. 41; *Chandler v. Brown*, 77 Ill. 388; *Billings v. Robinson*, 28 Hun, 122, affirmed 94 N. Y. 415; *Ruggles v. Brock*, 6 Hun, 164; *Pentz v. Hawley*, 1 Barb. Ch. 122; *Stillman v. Dougherty*, 44 Md. 380.

¹*Ooe v. New Jersey M. R. Co.* 27 N. J. Eq. 37.

²*Newbold v. Peoria & S. R. Co.* 5 Ill. App. 367.

Receiver's certificates have been authorized for the following purposes:

Labor supplies, taxes, &c., for railways:

Union Trust Co. v. Illinois M. R. Co. 117 U. S. 484, 29 L. ed. 963; *Humphreys v. Allen*, 101 Ill. 490.

Rolling Stock, Machinery, etc.:

Swann v. Clark, 110 U. S. 602, 28 L. ed. 256; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895.

Repairs:

Hoover v. Montclair & G. L. R. Co. 29 N. J. Eq. 4.

Completion of road, connecting lines, etc.:

Bank of Montreal v. Chicago, C. & W. R. Co. 48 Iowa, 518; *Kneeland v. Luce*, 141 U. S. 491, 35 L. ed. 830; *Karn v. Rorer Iron Co.* 86 Va. 754.

³*Howe v. Jones*, 60 Iowa, 70; *Howe v. Jones*, 71 Iowa, 92.

he has no right to appeal without leave of the court.¹ An appeal by a receiver from a decision against him is not evidence of bad faith on his part, and may be evidence of judicious management.² As a general rule it may be stated that he has a right to the same defenses that could have been urged by the person or corporation over whose property he appointed including the rights of appeal,³ but in all cases it must be done under the order and direction of the court.⁴ His right to appeal in matters relating to his compensation is clear and unquestioned;⁵ in such case he is in fact a party in interest.⁶ Of course in all cases of appeal by the receiver the question of the nature of the order and whether it is final or simply interlocutory are to be taken into consideration.⁷ He has

¹*Re City & County Invest. Co.* L. R. 18 Ch. Div. 475; *Re Silver Valley Mines*, L. R. 21 Ch. Div. 381. An appeal will not be dismissed because the receiver did not first obtain leave of the court. The allowance of the appeal is equivalent to leave of court to take it. *Farlow v. Kelly*, reported only in U. S. Sup. Ct. Reports, 26 L. ed. 427.

²*Devendorf v. Dickinson*, 21 How. Pr. 275. "Defendants show no bad faith or mismanagement of the action on the part of the receiver; that he still persevered after being beaten at special term and appealed to the general term clearly is not such evidence; it is only evidence of perseverance and nothing more. It may be meritorious rather than censurable."

³*Melendy v. Barbour*, 78 Va. 544. If he were not permitted to appeal, injustice to the parties might result. *Steele v. White*, 2 Paige, 478; *Cuyler v. Moreland*, 6 Paige, 273; *Stone v. Byrne*, 5 Bro. P. C. 213.

⁴*McKinnon v. Wolfenden*, 78 Wla. 287. And see *Dorsey v. Sibert*, 93 Ala. 312. These cases are based upon the idea that the receiver is the agent of court and not a party in interest to the proceeding and therefore not entitled to appeal.

⁵*Herndon v. Hurter*, 19 Fla. 397;

Magee v. Cowperthwaite, 10 Ala. 966; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 221, 34 L. ed. 104; *Hinckley v. Gilman, C. & S. R. Co.* 94 U. S. 467, 24 L. ed. 166. He cannot appeal from an order on a motion to vacate the appointment. *L'Engle v. Florida C. R. Co.* 14 Fla. 266.

⁶*Hinckley v. Gilman, C. & S. R. Co.* 94 U. S. 467, 24 L. ed. 166; *Whitaker v. Sparkman*, 30 Fla. 347; *Cf. Adair Co. v. Owenby*, 75 Mo. 282.

⁷See Appeals. Also *Rochat v. Gee*, 91 Cal. 355; *Illinois Trust & Sav. Bank v. Pacific R. Co.* 99 Cal. 407; *Whitaker v. Sparkman*, 30 Fla. 347; *Hinckley v. Gilman, C. & S. R. Co.* 94 U. S. 467, 24 L. ed. 166; *Washington, G. & A. R. Co. v. Washington*, 74 U. S. 7 Wall. 577, 19 L. ed. 275; *Thompson v. McKim*, 6 Har. & J. 302.

As to what are final orders, see *Jeffreys v. Coleman*, 20 Fla. 536; *Williams v. Hutchinson*, 26 Fla. 513; *Williams v. Morgan*, 111 U. S. 684, 28 L. ed. 559; *Savannah v. Jessup*, 106 U. S. 583, 27 L. ed. 276; *Milwaukee & M. R. Co. v. Soutter*, 69 U. S. 2 Wall. 510, 17 L. ed. 900; *Grant v. Phoenix Mut. L. Ins. Co.* 106 U. S. 429, 27 L. ed. 287; *Louisiana Nat. Bank v. Whitney*, 121 U. S. 284, 30 L. ed. 961; *International Improv. Fund v. Greenough*, 105 U. S. 527, 26

no right to appeal from an order directing him to close his accounts and pay over.¹

§ 42. Miscellaneous powers.

A receiver of an insolvent corporation who is authorized to sue for and recover "all the estate debts and things in action," belonging to the corporation may maintain trover for the conversion of the personal property of the corporation before he was appointed receiver.² The receiver of a bank who has succeeded to all its rights and interests may move to set aside an attachment against such property on the ground of irregularity.³ He has no right to summarily eject the occupant of land and take possession of his personalty without a trial of the right of such possessor to such personalty, and an order authorizing him to do so granted on a mere special proceeding will not be sustained.⁴ A receiver appointed to sue for and collect such debts as are or may become due and pay over the proceeds to a third person has authority to receive money payable under a contract before it becomes due; and if they be accepted by the third party he may take notes in place of money.⁵ Having authority to collect rents he has authority to collect those which are to become due as well as those which are due.⁶ Courts have power to compel a settlement of a claim against property in the hands of a receiver, with or without the consent of the receiver, and in case of his refusal the court may remove him.⁷

L. ed. 1158; *Williams v. Morgan*, 111 U. S. 684, 28 L. ed. 559; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 839; *Ex parte Farmers' Loan & T. Co.* 129 U. S. 206, 32 L. ed. 656; *Hovey v. McDonald*, 109 U. S. 150, 27 L. ed. 888.

¹*Re Colvin*, 8 Md. Ch. 278. If a receiver appeals and subsequently a new receiver is appointed, the new receiver may be substituted in the appellate court. *Bowden v. Johnson*, 107 U. S. 251, 27 L. ed. 886.

²*Gillet v. Fairchild*, 4 Denio, 80.

³*Bowen v. First Nat. Bank*, 34 How. Pr. 408.

⁴*McCombs v. Merryhew*, 40 Mich. 721.

⁵*Olcott v. Heermans*, 3 Hun. 494.

⁶*Cox v. Volkert*, 86 Mo. 505.

⁷*Guardian Sav. Inst. v. Bowling Green Sav. Bank*, 65 Barb. 275.

A receiver has no right to interfere in a suit brought by an executor before the appointment of such receiver, and then pending, without an order of court. *Gadsden v. Whaley*, 14 S. C. 210; *Tracy v. First Nat. Bank*, 37 N. Y. 523.

On a creditor's bill against a decedent's estate, where the administrator had been removed and the sheriff appointed administrator d. b. n.; and the unadministered assets were not sufficient to pay the debts of the estate,

A temporary receiver of a bank has no power without instructions of the court to surrender collaterals pledged as security for a loan and to permit an offset of the amount on deposit in the bank.¹ He may execute on payment formal satisfaction and discharge of mortgages in his hands as receiver, though the amount secured thereby is not due,² and may have authority under the New Jersey statute to compel a disclosure of the knowledge possessed by any person of the affairs and transactions of the company defendant, and a creditor may have such disclosures on proper application for that purpose to the receiver.³ Where two or more liquidators have power to accept bills it is doubtful if they have power to delegate to one the right to accept such bills,⁴ and one liquidator has no power to use the seal of the company, even in carrying out an agreement made by both in the absence of resolutions expressly authorizing the same to be used,⁵ nor has the surviving liquidator power to use such seal. A receiver *pendente lite* has no power to become a mortgagee of property in his possession as such officer,⁶ nor has he power to subject personal property found upon the premises to a lien for storage expenses which will take precedence over a prior mortgage.⁷ A receiver of a railroad corporation has no power beyond the corporate powers and duties of the corporation conferred by its charter; nor can the court enlarge or restrict such powers. He is bound by the charter the same as the directory;⁸ nor has a liquidator power to recover in an action by him where the company itself could not have recovered.⁹ A tender cannot be made to a receiver, he not being a contracting party.¹⁰ He has no right to discriminate in freight, where such discrimination is prohibited by statute.¹¹

such administrator d. b. n. is not entitled to receive and hold the remaining assets, because they had once been administered,—a receiver should be appointed, as he is the only one with ample power in such a case. *Harman v. McMullin*, 85 Va. 187.

¹*People, etc. v. St. Nicholas Bank*, 83 N. Y. 522.

²*Heermans v. Clarkson*, 64 N. Y. 171.

³*Smith v. Trenton & Delaware Falls Co.* 4 N. J. Eq. 605.

⁴*Re London & M. Bank*, L. R. 6 Ch. App. 206.

⁵*Re Metropolitan Bank*, L. R. 2 Ch. Div. 366, 45 L. J. Ch. 525.

⁶*Thompson v. Holladay*, 15 Or. 34.

⁷*Vette v. Leonore*, 42 Mo. App. 217.

⁸*Safford v. People*, 85 Ill. 558.

⁹*Waterhouse v. Jamieson*, L. R. 2 H. L. (Sc.) 29.

¹⁰*Poague v. Greenlee*, 22 Gratt. 724.

¹¹*Cutting v. Florida R. & Nav. Co.* 48 Fed. Rep. 747.

CHAPTER IV.

RECEIVER'S POSSESSION.

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| <p>§ 43. How disturbed.</p> <p>§ 44. Not disturbed by court of co-ordinate jurisdiction.</p> <p>§ 45. Not to be disturbed by levy.</p> <p>§ 46. Not to be disturbed by strikes, conspiracies, etc.</p> <p style="padding-left: 20px;">(a) Courts will not enjoin employees from quitting service.</p> <p style="padding-left: 20px;">(b) But will enjoin conspiracies.</p> <p>§ 47. Leave of court, when required.</p> <p>§ 48. Duty of receiver to take possession of property.</p> | <p>§ 49. As against public improvements.</p> <p>§ 50. Duty as to opening a new business.</p> <p>§ 51. As to tenants.</p> <p>§ 52. To whom restored.</p> <p>§ 53. Extent of.</p> <p>§ 54. As to taxes.</p> <p>§ 55. As to set-off.</p> <p>§ 56. As to exemptions.</p> <p>§ 57. As to executors and administrators.</p> |
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§ 43. How disturbed.

Modes of interference with the possession of the court through its receiver are (1) by the orders of other courts of co-ordinate jurisdiction;¹ (2) by the levy of executions and attachments;² (3) by strikes;³ (4) ejectments;⁴ (5) trespasses;⁵ (6) distress for rent;⁶

¹*People v. Central City Bank*, 58 Barb. 412, 35 How. Pr. 428; *Deming v. New York Marble Co.* 12 Abb. Pr. 66; *Davis v. Alabama & F. R. Co.* 1 Woods, 661; *Rogers v. Corning*, 44 Barb. 229; *Re Hulst*, 7 Ben. 17; *Ward v. Swift*, 6 Hare, 309; *Beecher v. Binninger*, 7 Blatchf. 170; *Gelpcke v. Milwaukee & H. R. Co.* 11 Wis. 454; *Smith v. McNamara*, 15 Hun, 447; *Judd v. Bankers' & M. Teleg. Co.* 31 Fed. Rep. 182; *Hazelrigg v. Bronaugh*, 78 Ky. 62; *Sedgwick v. Menck*, 6 Blatchf. 156; *Peoples' Bank v. Winslow* ("Peoples' Bank v. Calhoun") 102 U. S. 256, 23 L. ed. 101; *Re Clark*, 4 Ben. 88; *De Winton v. Brecon*, 28 Beav. 200. *Contra*, *Phelan v. Ganabin*, 5 Colo. 14; *Bond v. First Nat. Bank*, 5 Colo. 83.

²*Lane v. Sterne*, 3 Giff. 629; *Ryan v. Kingsbery*, 88 Ga. 861; *Hazelrigg v.*

Bronaugh, 78 Ky. 62; *Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322; *Chafes v. Quidnick Co.* 13 R. I. 442; *Edwards v. Norton*, 55 Tex. 405; *Dugger v. Collins*, 69 Ala. 324; *Jackson v. Lahee*, 114 Ill. 287; *Richards v. People*, 81 Ill. 551; *Try v. Try*, 18 Beav. 422; *Com. v. Young*, 11 Phila. 606.

³*Arthur v. Oakes*, 63 Fed. Rep. 310, 25 L. R. A. 414.

⁴*Angel v. Smith*, 9 Ves. Jr. 335; *Fort Wayne, M. & C. R. Co. v. Mellott*, 92 Ind. 535; *Potter v. Spa Spring Brick Co.* 47 N. J. Eq. 442.

⁵*Parker v. Browning*, 8 Paige, 888; *Re Day*, 34 Wis. 638; *Ex parte Cochran*, L. R. 20 Eq. 282.

⁶*Marshall v. Lockett*, 76 Ga. 289; *Martin v. Black*, 9 Paige, 641; *Grant v. Davenport*, 18 Iowa, 179.

(7) force;¹ (8) condemnation proceedings;² (9) tax officers;³ (10) unlawfully withholding;⁴ (11) garnishment;⁵ (12) bankruptcy proceedings;⁶ (13) untrue circulars and publications;⁷ (14) a subsequent receiver of another court;⁸ (15) commencing suits against the receiver without leave of court;⁹ (16) manufacturing a patented article over which the receiver has control as manager.¹⁰

§ 44. Not disturbed by court of co-ordinate jurisdiction.

It has been a rule, with scarcely an exception, since the days of Chief Justice Marshall, that, as between courts of concurrent jurisdiction, the court which first secures possession of the subject-matter of the litigation, will retain jurisdiction." This rule

¹*Atty. Gen. v. St. Cross Hospital*, 18 Beav. 601; *Broad v. Wickham*, 4 Sim. 511.

²*Tink v. Rundle*, 10 Beav. 318.

³*Re Tyler*, 149 U. S. 164, 37 L. ed. 689; *King v. Wooten*, 54 Fed. Rep. 612, 2 U. S. App. 651. *Contra*, *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 26 Fed. Rep. 11.

⁴*Re Cohen*, 5 Cal. 494; *Ryan v. Kingsbery*, 88 Ga. 361; *Goisse v. Beall*, 5 Wis. 224; *American Const. Co. v. Jacksonville, T. & K. W. R. Co.* 52 Fed. Rep. 937; *Green v. Green*, 2 Sim. 430; *Miller v. Jones*, 39 Ill. 54; *Brandt v. Allen*, 76 Iowa, 50, 1 L. R. A. 653; *Griffith v. Griffith*, 2 Ves. Jr. 400; *People v. Rogers*, 2 Paige, 103.

⁵*Richards v. People*, 81 Ill. 551; *Gouverneur v. Warner*, 2 Sandf. 624; *Walker v. George Taylor Commission Co.* 56 Ark. 1; *Killmer v. Hobart*, 8 Abb. N. C. 426; *Taylor v. Gillson*, 23 Tex. 508; *Borer v. Chapman*, 119 U. S. 587, 30 L. ed. 532; *McGowan v. Myers*, 66 Iowa, 99; *Jackson v. Lahee*, 114 Ill. 287; *Field v. Jones*, 11 Ga. 413; *Blake Crusher Co. v. New Haven*, 46 Conn. 473; *Cooke v. Orange*, 48 Conn. 401; *Smith v. McNamara*, 15 Hun, 447; *Com. v. Hide & L. Ins. Co.* 119 Mass. 155; *Columbian Book Co. v. DeGolyer*, 115 Mass. 67. See *contra*,

Farmers' Bank v. Beaton, 7 Gill & J. 421.

⁶*Skip v. Harwood*, 3 Atk. 564.

⁷*Helmere v. Smith*, L. R. 35 Ch. Div. 449.

⁸*Ward v. Swift*, 6 Hare, 309. But see *Bailey v. O'Mahony*, 1 Jones & S. 289.

⁹*Re Higgins*, 27 Fed. Rep. 443; *Parker v. Browning*, 8 Paige, 388.

¹⁰*Re Woven Tape Skirt Co.* 12 Hun, 111.

¹¹*Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815; *Moran v. Sturges*, 154 U. S. 256, 274, 38 L. ed. 981, 987; *Stout v. Lys*, 103 U. S. 66, 26 L. ed. 428; *Ellis v. Davis*, 109 U. S. 485, 37 L. ed. 1006; *Buck v. Colbath*, 70 U. S. 8 Wall. 334, 18 L. ed. 257; *Krippendorff v. Hyde*, 110 U. S. 276, 28 L. ed. 145; *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390; *Taylor v. Carryl*, 61 U. S. 20 How. 583, 15 L. ed. 1028; *Borer v. Chapman*, 119 U. S. 587, 30 L. ed. 532; *Peck v. Jenness*, 48 U. S. 7 How. 612, 12 L. ed. 841; *Smith v. McIner*, 23 U. S. 9 Wheat. 532, 6 L. ed. 152; *Hagan v. Lucas*, 35 U. S. 10 Pet. 400, 9 L. ed. 470; *Wickham v. Hall*, 60 Fed. Rep. 326; *Bruce v. Manchester & K. Rail-*

is founded not only on comity but necessity, for if one could adjudge and another reverse, the contest might go on until par-

road, 19 Fed. Rep. 342; *Briggs v. Stroud*, 58 Fed. Rep. 720; *The J. W. French*, 18 Fed. Rep. 916; *Massachusetts Mut. L. Ins. Co. v. Chicago & A. R. Co.* 13 Fed. Rep. 857; *Harrison Wire Co. v. Wheeler*, 11 Fed. Rep. 206; *Walker v. Flint*, 7 Fed. Rep. 435; *Union Mut. L. Ins. Co. v. University of Chicago*, 6 Fed. Rep. 448; *Hamilton v. Chouteau*, 6 Fed. Rep. 839; *Levi v. Columbia L. Ins. Co.* 1 Fed. Rep. 206; *Crane v. McCoy*, 1 Bond, 422; *Parsons v. Lyman*, 5 Blatchf. 170; *Ex parte Robinson*, 6 McLean, 355.

Mr. Justice Bradley in *Wilmer v. Atlanta & R. A. L. R. Co.* 2 Woods, 409, in speaking of this rule says: "The test I think is this: not which action was first commenced, nor which cause of action has priority or superiority but which court first acquires jurisdiction over the property. . . . Service of process gives jurisdiction over the person,—seizure gives jurisdiction over the property; and, until it is seized, no matter when the suit was commenced the court does not have jurisdiction." See also *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390; *Rio Grande R. Co. v. Vinet*, 132 U. S. 478, 33 L. ed. 400; *Heidritter v. Elizabeth Oil Cloth Co.* 112 U. S. 294, 28 L. ed. 729; *Wallace v. McConnell*, 88 U. S. 13 Pet. 151, 10 L. ed. 102; *Williams v. Benedict*, 49 U. S. 8 How. 111, 12 L. ed. 1008; *Payne v. Dreus*, 4 East, 538; *Pulliam v. Osborne*, 58 U. S. 17 How. 471, 15 L. ed. 154; *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 666; *O'Mahony v. Belmont*, 5 Jones & S. 380; *Millikin v. Barrow*, 55 Fed. Rep. 148; *Howlett v. Central Caroline Land & I. Co.* 56 Fed. Rep. 161; *Remington Paper Co. v. Louisiana Printing & Pub. Co.* 56 Fed. Rep. 287; *Olyde v.*

Richmond & D. R. Co. 56 Fed. Rep. 539; *Wilmer v. Atlanta & R. A. L. R. Co.* 2 Woods, 426; *Young v. Montgomery & E. R. Co.* 2 Woods, 606; *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 49 Fed. Rep. 608, 15 L. R. A. 109; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.* 58 Fed. Rep. 268; *Cole v. Oil Well Supply Co.* 57 Fed. Rep. 534; *Re Langford*, 57 Fed. Rep. 570; *Re Schuyler's Steam Tow Boat Co.* 136 N. Y. 169, 20 L. R. A. 391; *Hamilton-Brown Shoe Co. v. Mercer*, 84 Iowa, 539; *Senior v. Pierce*, 31 Fed. Rep. 627; *Witters v. Sowles*, 32 Fed. Rep. 772; *Gumbel v. Pitkin*, 124 U. S. 181, 31 L. ed. 378; *Second Nat. Bank v. Dunn*, 97 N. Y. 156.

As to interference with custody of other courts of property *in custodia legis*, see *Briggs v. Stroud*, 58 Fed. Rep. 720; *Gay v. Brierfield*, 94 Ala. 312; *Byers v. McAuley*, 149 U. S. 614, 37 L. ed. 871; *Re Schuyler's Steam Tow Boat Co.* 136 N. Y. 175, 20 L. R. A. 391; *Moran v. Sturges*, 154 U. S. 274, 38 L. ed. 987; *Thompson v. Haladay*, 15 Or. 54; *Rio Grande R. Co. v. Vinet*, 132 U. S. 482, 33 L. ed. 401; *Thompson v. Phenix Ins. Co.* 136 U. S. 297, 34 L. ed. 413; *Hamilton-Brown Shoe Co. v. Mercer*, 84 Iowa, 539; *Porter v. Sabin*, 149 U. S. 480, 37 L. ed. 818; *Ahlhauser v. Butler*, 50 Fed. Rep. 707; *Glenn v. Liggett*, 47 Fed. Rep. 474; *Ball v. Tompkins*, 41 Fed. Rep. 490; *Gates v. Bucki*, 53 Fed. Rep. 967; *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 49 Fed. Rep. 611, 15 L. R. A. 109; *Denny v. Bennett*, 128 U. S. 503, 32 L. ed. 496; *Melvin v. Robinson*, 31 Fed. Rep. 635; *Farmers' Loan & T. Co. v. San Diego Street Car Co.* 49 Fed. Rep. 197; *The Daniel Kaine*, 35 Fed. Rep. 788; *Taft v. Stern-*

ties became exhausted and courts were brought into contempt. The application of this rule is to be made in cases where courts of concurrent jurisdiction appoint receivers for the same property. Apparently a different rule prevails in a contest between receivers and officers holding writs of attachment or executions. In such cases the rule is well-nigh universal that after the appointment of a receiver the property to which the receivership relates is to be deemed *in custodia legis*, and a levy of an execution or attachment subsequent to such order will not be permitted, as it interferes with the receiver's right of possession.¹ As we have

berg, 40 Fed. Rep. 7; *State, Klotz v. Ross*, 118 Mo. 58.

As to interfering with the possession or custody of officers of other courts, see *Senior v. Pierce*, 31 Fed. Rep. 627; *Gumbel v. Pitkin*, 124 U. S. 144, 31 L. ed. 378; *Witters v. Sowles*, 33 Fed. Rep. 772; *Second Nat. Bank v. Dunn*, 97 N. Y. 156.

As to interfering with process of other courts, see *Central Nat. Bank v. Hazard*, 49 Fed. Rep. 295; *Re Johnson*, 46 Fed. Rep. 480; *Ex parte Conway*, 48 Fed. Rep. 78; *Re Fox*, 51 Fed. Rep. 427.

As to interference by state courts with custody of Federal courts and officers, see *Denny v. Bennett*, 128 U. S. 502, 32 L. ed. 496; *Ex parte Tyler*, 149 U. S. 186, 37 L. ed. 696; *Bolts v. Eagan*, 84 Fed. Rep. 447; *Ahlhauser v. Butler*, 50 Fed. Rep. 707; *American Assn. v. Hurnt*, 59 Fed. Rep. 4; *Morrison v. Menhaden Co.* 37 Hun, 524; *Hill v. Corcoran*, 15 Colo. 272; *Gay v. Brierfield Coal & I. Co.* 94 Ala. 312, 16 L. R. A. 564.

As to interference by Federal court with custody of state courts, see *Melvin v. Robinson*, 31 Fed. Rep. 635; *The E. L. Cain*, 45 Fed. Rep. 369; *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 49 Fed. Rep. 611, 15 L. R. A. 109; *Tefft v. Sternberg*, 40 Fed. Rep. 5; *Pickett v. Filer*, 40 Fed. Rep. 313;

Gates v. Bucki, 53 Fed. Rep. 966; *Howlett v. Central Carolina Land & I. Co.* 56 Fed. Rep. 162.

An interference with the receiver's possession will not be permitted on the ground that his appointment was illegal or improvidently made. *Cook v. Citizens' Nat. Bank*, 73 Ind. 256. This is based upon the ground that the appointment cannot be collaterally attacked. Cf. *Ames v. Birkenhead Docks Trustees*, 20 Beav. 332; *Russell v. East Anglian R. Co.* 3 Macn. & G. 104. In this case Lord Chancellor Truro said: "I am of the opinion that it is not competent for any one to interfere with the possession of a receiver, or to disobey an injunction, or any other order of the court on the ground that such orders were improvidently made. Parties must take a proper course to question their validity, but while they exist they must be obeyed."

¹*Texas Trunk R. Co. v. Lewis*, 81 Tex. 1; *Storm v. Waddell*, 2 Sandf. Ch. 505; *Van Alstyne v. Cook*, 25 N. Y. 496; *Skinner v. Maxwell*, 68 N. C. 400; *Rutter v. Tallis*, 5 Sandf. 610; *Maynard v. Bond*, 67 Mo. 315.

In an action to recover land covered by a road-bed where a receiver has been appointed the court will not issue a writ of restitution since it would be an interference with the

already seen the receivership must of necessity relate to the date of granting the order; otherwise the purposes of the receivership would be frustrated in many cases. The receivership is, in its nature, an equitable execution operating, in its effects, from the date of granting.¹ Besides, the receiver's possession does not destroy any

property and be in contempt of the court appointing the receiver. The plaintiff after judgment should apply to the court making the appointment. *Abbey v. International & G. N. R. Co.* 5 Tex. Civ. App. 261.

The receiver being an officer of court will be protected in his possession and no interference therewith will be permitted without leave.

It has been held that a failure to obtain leave to sue the receiver does not divest the court of jurisdiction. Failure to obtain leave is a question of contempt and not of jurisdiction. *Mulcahey v. Strauss*, 151 Ill. 70.

Cf. *Wayne Pike Co. v. State*, 184 Ind. 672; *Davis v. Ladoga Creamery Co.* 128 Ind. 222; *Elkhart Car Works Co. v. Ellis*, 118 Ind. 215; *Keen v. Breckenridge*, 96 Ind. 69; *Garver v. Kent*, 70 Md. 428; *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225; *Kinney v. Crocker*, 18 Wis. 75; *Melendy v. Barbour*, 78 Va. 514; *Reed v. Axtell*, 84 Va. 231; *Jones v. Browne*, 82 W. Va. 444; *Spalding v. Com.* 88 Ky. 185; *Lyman v. Central Vermont R. Co.* 59 Vt. 167; *Martin v. Atchison*, 2 Idaho, 590; *Allen v. Central R. Co.* 42 Iowa, 683. But see *contra*, *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Taylor v. Mayo*, 110 U. S. 330, 28 L. ed. 163 (Injunction); *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. Rep. 528; *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 260; *Walling v. Miller*, 108 N. Y. 173; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Re Christian Jensen Co.* 128 N. Y. 550; *Smith v. New York Consol. Stage Co.* 18 How. Pr. 377; *Wiswall v. Sampson*,

52 U. S. 14 How. 52, 14 L. ed. 822; *Artisans' Bank v. Treadwell*, 84 Barb. 552; *Wilson v. Allen*, 6 Barb. 543; *Davies v. Lathrop*, 20 Blatchf. 397; *Steele v. Sturges*, 5 Abb. Pr. 442; *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 109; *Russell v. Texas & P. R. Co.* 68 Tex. 646; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Skinner v. Maxwell*, 68 N. C. 400; *Chafes v. Quidnick Co.* 13 R. I. 442; *Payne v. Baxter*, 2 Tenn. Ch. 517; *Olds v. Tucker*, 35 Ohio St. 584; *Thompson v. McCleary*, 159 Pa. 189.

Property cannot be levied on and sold so as to confer any right by virtue of such levy and sale. *Wiswall v. Sampson*, 52 U. S. 14 How. 52, 14 L. ed. 822; *Edwards v. Norton*, 55 Tex. 410; *Hackley v. Swigert*, 5 B. Mon. 86.

¹*Clinkscale v. Pendleton Mfg. Co.* 9 S. C. N. S. 318; *Regenstein v. Pearlstein*, 80 S. C. 192; *Re Christian Jensen Co.* 128 N. Y. 559; *Re Schuyler's Steam Tow Boat Co.* 64 Hun, 386, 186 N. Y. 169, 20 L. R. A. 391; *Re Berry*, 26 Barb. 55; *Smith v. New York Consol. Stage Co.* 18 Abb. Pr. 420; *Atlas Bank v. Nahant Bank*, 23 Pick. 490; *Re Mallory*, 18 N. Y. S. R. 99; *Deming v. New York Marble Co.* 12 Abb. Pr. 66; *Steele v. Sturges*, 5 Abb. Pr. 442; *Van Alstyne v. Cook*, 25 N. Y. 489; *Rutter v. Tullis*, 5 Sandf. 610; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Pope v. Ames*, 20 Or. 199; *Maynard v. Bond*, 67 Mo. 315; *Ex parte Evans*, L. R. 13 Ch. Div. 252. *Contra*, *Farmers' Bank v. Beaton*, 7 Gill & J. 421; *Edwards v. Edwards*, L. R. 2 Ch. Div. 291; *Frazer v. Richmond & A. R. Co.* 81

existing rights, but on the contrary protects and preserves them. A receiver derives his authority from the act of the court and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property,¹ nor disturb any liens thereon.²

§ 45. Not to be disturbed by levy.

When a receiver is in possession of property under process or authority of the court, in execution of a decree or decretal order, his possession is not to be disturbed, even by an ejectment under an adverse title without leave of the court,³ nor will the court permit property in the hands of its receiver to be levied on and sold under an execution or attachment,⁴ nor replevied from the

Va. 888; *Defries v. Creed*, 84 L. J. Eq. N. S. 607; *Chamberlain v. Rochester Seamless Paper Vessel Co.* 7 Hun, 557 (Statutes).

The giving of bond, however, is a condition precedent to commencing suit. *Phillip v. Smoot*, 1 Mackey, 478.

¹ *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 34 L. ed. 341; *Skip v. Harwood*, 3 Atk. 564; *Anon.* 2 Atk. 15; *Wiswall v. Sampson*, 52 U. S. 14 How. 52, 14 L. ed. 322; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Maynard v. Bond*, 67 Mo. 315; *Heiman v. Fisher*, 11 Mo. App. 275; *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408; *Porter v. Sabin*, 149 U. S. 479, 37 L. ed. 818.

² *Lorch v. Altman*, 75 Ind. 162; *J. W. Dann Mfg. Co. v. Parkhurst*, 125 Ind. 317; *Favorite v. Deardorff*, 84 Ind. 555; *Van Roun v. San Francisco Super. Ct.* 58 Cal. 358; *Louiza v. San Francisco Super. Ct.* 85 Cal. 11, 9 L. R. A. 37; *Coburn v. Ames*, 52 Cal. 385; *Núlink v. Morris Canal & Bkg. Co.* 4 N. J. Eq. 377; *Chase's Case*, 1 Bland,

Ch. 206; *Beverley v. Brooks*, 4 Gratt. 187; *Skip v. Harwood*, 3 Atk. 564; *Re North American Gutta Percha Co.* 17 How. Pr. 549; *Becker v. Torrance*, 31 N. Y. 631; *Gere v. Dibble*, 17 How. Pr. 31; *Rich v. Loutrel*, 18 How. Pr. 121; *Hall v. Merrill*, 9 Abb. Pr. 121; *Davenport v. Kelley*, 42 N. Y. 193; *Bowling Green Sav. Bank v. Todd*, 64 Barb. 146; *Union Trust Co. v. Weber*, 96 Ill. 346.

³ *Angel v. Smith*, 9 Ves. Jr. 338; *Fort Wayne, M. & C. R. Co. v. Mellett*, 92 Ind. 535; *Potter v. Spa Spring Brick Co.* 47 N. J. Eq. 442.

⁴ *Parker v. Browning*, 8 Paige, 388. The reason for this rule is that a court of equity will not permit itself to be made a suitor in a court of law. Chancellor Walworth in *Parker v. Browning* says: "Where the property is legally and properly in the possession of the receiver it is the duty of the court to protect that possession, not only against acts of violence, but also against suits at law; so that a third person claiming the same may be compelled to come in

and ask to be examined *pro inter esse suo*, if he wishes to test the justice of such claim." See also *Fessenden v. Woods*, 8 Bosw. 550; *Duggen v. Collins*, 69 Ala. 324; *Winwall v. Sampson*, 53 U. S. 14 How. 52, 14 L. ed. 822; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160. In this case the court said: "It was then *in gremio legis*, in legal custody, and to permit it to be levied on and sold under the process of the court of common pleas would at once raise a conflict of jurisdiction and interfere with the rights of the receiver of the supreme court to manage the property under his appointment." See also *Trustee: Martin v. Davis*, 21 Iowa, 585; *Bentley v. Shrieve*, 4 Md. Ch. 412. It has been held, however, that where the lien of a judgment had attached at the time of the appointment of a receiver, the levy and sale by the sheriff do not disturb the receiver's possession and the sheriff is not in contempt of court. *Albany City Bank v. Schermerhorn*, 9 Paige, 372; *State v. Snohomish County Sup. Ct.* 7 Wash. 77. But the weight of authority as well as reason is against this position. In addition to cases above cited, see also *Langdon v. Lockett*, 6 Ala. 727; *Taylor v. Gillean*, 23 Tex. 598; *Thompson v. McCleary*, 159 Pa. 180; *Gouverneur v. Warner*, 2 Sandf. 624; *Field v. Jones*, 11 Ga. 418; *Walling v. Miller*, 108 N. Y. 173; *Yuba County v. Adams*, 7 Cal. 35; *Noe v. Gibson*, 7 Paige, 518; *Nelson v. Connor*, 6 Rob. (La.) 339; *Glenn v. Gill*, 2 Md. 1; *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 109; *Edwards v. Norton*, 55 Tex. 405; *Russell v. East Anglian R. Co.* 3 Macn. & G. 104; *Coe v. Columbus, P. & I. R. Co.* 10 Ohio St. 403.

Following the doctrine of *Albany City Bank v. Schermerhorn*, is the case of *Bergin v. Deering*, 70 Hun, 379, where partners disagreeing as to the

management of their business agreed to the appointment of a receiver, but after the lien of judgment had attached the court refused to order the property turned over to the receiver.

As to the exclusive jurisdiction of the court having property in its possession see further: *Taylor v. Carryl*, 61 U. S. 20 How. 596, 15 L. ed. 1032; *Peale v. Phipps*, 55 U. S. 14 How. 875, 14 L. ed. 461; *Ex parte Chamberlain*, 55 Fed. Rep. 708; *Heidritter v. Elizabeth Oil Cloth Co.* 112 U. S. 303, 28 L. ed. 732; *Glenn v. Liggett*, 47 Fed. Rep. 473; *Fox v. Hempfield R. Co.* 2 Abb. U. S. 155; *Waterhouse v. Comer*, 55 Fed. Rep. 149, 19 L. R. A. 403; *Re Clark & Bining*, 4 Ben. 98; *Lamb v. Ewing*, 54 Fed. Rep. 278; *Re Cook & Gleason*, 8 Bliss. 119; *Gay v. Brierfield Coal & I. Co.* 94 Ala. 310, 16 L. R. A. 564; *Re Vogel*, 7 Blatchf. 20; *Re Schuyler Steam Tow Boat Co.* 64 Hun, 388; *Attleborough Nat. Bank v. Northwestern Mfg. & Car Co.* 28 Fed. Rep. 114; *Re Peebles*, 2 Hughes, 394; *Walker v. Flint*, 2 McCrary, 343, 7 Fed. Rep. 436; *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 421. As to protection of the receiver in custody of property, see *Barton v. Barbour*, 104 U. S. 29, 26 L. ed. 675; *Savannah v. Jesup*, 106 U. S. 565, 27 L. ed. 277; *Blake v. Alabama & C. R. Co.* 6 Bank. L. Reg. 332; *Perego v. Bonesteel*, 5 Bliss. 69; *Andrews v. Smith*, 19 Blatchf. 103; *Thompson v. Scott*, 4 Dill. 509; *Kennedy v. Indianapolis, C. & L. R. Co.* 3 Fed. Rep. 99; *Young v. Montgomery & E. R. Co.* 2 Woods, 606; *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 115; *Chautauque County Bank v. Risley*, 19 N. Y. 377; *Day v. Postal Teleg. Co.* 66 Md. 354; *Melendy v. Barbour*, 78 Va. 557; *Fort Wayne, M. & O. R. Co. v. Mellett*, 92 Ind. 538; *Walling v. Miller*, 108 N. Y. 177; *Re Tyler*, 149 U. S. 181, 37 L. ed.

receiver without leave of court,¹ nor is the sheriff or other officer in justification of his seizure permitted to question the propriety or regularity of the order under which the receiver was appointed.² Any unauthorized interference with his possession will subject the party interfering to an attachment for contempt.³ The judgment in a proceeding for contempt where the person

695; *Thompson v. Phenix Ins. Co.* 186 U. S. 297, 34 L. ed. 413; *Porter v. Sabin*, 149 U. S. 479, 37 L. ed. 818; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 236, 34 L. ed. 848; *Preston v. Loughran*, 58 Hun, 216; *Rogers v. Wheeler*, 48 N. Y. 604; *Garden City Bkg. & T. Co. v. Geilfuss*, 86 Wis. 622; *Pacific R. Co. v. Wade*, 91 Cal. 455, 18 L. R. A. 754; *Littlejohn v. Turner*, 78 Wis. 124.

In the case of *Woerishoffer v. North River Const. Co.* 99 N. Y. 398, the court of appeals sustained an order granting permission to a creditor to proceed to judgment, and permitting such creditor to collect and enforce any judgment it might obtain against property attached before the appointment of an ancillary receiver.

The permission of a court which has appointed a receiver over property to make him a party defendant to an action in another court to foreclose a mechanic's lien which existed on the property at the time of his appointment, is not a relinquishment of control of the property which authorizes a judgment by such other court directing a public sale of the property by the sheriff with clear title to the purchaser. *Premier Steel Co. v. McElwaine-Richards Co.* (Ind.) 43 N. E. 876.

Authority should not be given to issue execution against the receiver of an insolvent bank upon a judgment operating merely as an established claim against the assets of the bank

held by him. *Arnold v. Penn* (Tex. Civ. App.) 32 S. W. 353.

¹ *Com. v. Young*, 11 Phila. 606. When a party claims title paramount to that of the receiver he must apply to the court for leave to proceed to assert his right. *De Groot v. Jay*, 30 Barb. 488. The holder under a valid bill of sale has no right to oust a receiver of his possession. *Ex parte Cochran*, *Re Mead*, L. R. 20 Eq. 282. But if the property does not belong to the receiver's estate it may be replaced. *Hills v. Parker*, 111 Mass. 508.

² *Russell v. East Anglian R. Co.* 3 Macn. & G. 104 (118); *Re Christian Jensen Co.* 128 N. Y. 550.

³ *Spinning v. Ohio L. Ins. & T. Co.* 2 Disney, 368; *De Visser v. Blackstone*, 6 Blatchf. 253; *King v. Ohio & M. R. Co.* 7 Biss. 529; *Secor v. Toledo, P. & W. R. Co.* 7 Biss. 542; *Vermont & O. R. Co. v. Vermont C. R. Co.* 46 Vt. 792; *Chafee v. Quidnick Co.* 13 R. I. 442; *Hull v. Thomas*, 3 Edw. Ch. 286; *Noe v. Gibson*, 7 Paige, 513; *Langford v. Langford*, 5 L. J. Ch. N. S. 60; *Russell v. East Anglian R. Co.* 3 Macn. & G. 104; *Broad v. Wickham*, 4 Sim. 511; *Skip v. Harwood*, 3 Atk. 564; *Lane v. Sterne*, 3 Giff. 629. As to the method of procedure by a creditor where the receiver refuses to institute proceedings for contempt for a wrongful taking of property, see *Moore v. Mercer Wire Co.* (N. J.) 15 Atl. 305, 737.

interfering is found to be guilty is a fine or imprisonment, or both, and not a money judgment.¹

An attempt to disturb the possession of the receiver without leave of the court first obtained will be a contempt on the part of the person making it,² as seen above, but may be restrained by injunction.³ The reason of this salutary rule is to be found in the necessity of protecting the receiver from litigation and vexatious actions in many jurisdictions, and in the fact that one court with the rights and interests of all parties before it can more equitably and completely administer the assets; and also in that if the property as a whole is permitted to be taken piece-meal its value will be liable to great depreciation, if not entirely lost. This rule of non-interference with the possession has been carried to the extent of preventing suits against the receiver in the other courts than that in which the receiver is appointed;⁴ but the rule is not to be extended so far as to exempt the receiver from suits in foreign

¹ *Edrington v. Pridham*, 65 Tex. 612; *Williamson's Case*, 26 Pa. 1.

² *Southern Exp. Co. v. Western N. O. R. Co.* 99 U. S. 191, 25 L. ed. 319; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Davis v. Gray*, 88 U. S. 16 Wall. 204, 21 L. ed. 447; *Thompson v. Scott*, 4 Dill. 508; *Re Schuyler's Steam Tow Boat Co.* 186 N. Y. 169; *Moore v. Mercer Wire Co.* (N. J.) 15 Atl. 805, 787; *DeGroot v. Jay*, 30 Barb. 483; *DeGraffenried v. Brunswick & A. Co.* 57 Ga. 22; *People, Tremper v. Brooks*, 40 Mich. 333; *Spinning v. Ohio L. Ins. & T. Co.* 2 Disney, 336; *Winwall v. Sampson*, 52 U. S. 14 How. 52, 14 L. ed. 322; *Ex parte Tyler*, 149 U. S. 181, 37 L. ed. 695; *Angel v. Smith*, 9 Ves. Jr. 335; *Ward v. Swift*, 6 Hare, 312; *Broad v. Wickham*, 4 Sim. 511; *Taylor v. Baldwin*, 14 Abb. Pr. 166; *Thomas v. Thomas*, Flan. & K. 621; *Woerishoffer v. North River Const. Co.* 99 N. Y. 898; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272. And a person who takes forcible possession of an estate over which a receiver has

been appointed may be committed without an order nisi. *Broad v. Wickham*, 4 Sim. 511. But not so in *Ireland, Fitzpatrick, v. Eyre*, 1 Hog. 171.

³ *Ex parte Chamberlain*, 55 Fed. Rep. 704; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. Rep. 687; *Marshall v. Lockett*, 76 Ga. 289; *Angel v. Smith*, 9 Ves. Jr. 335; *Evely v. Lewis*, 8 Hare, 472; *Turner v. Turner*, 15 Jur. 218; *Tink v. Rundle*, 10 Beav. 818; *Russell v. East Anglian R. Co.* 3 Macn. & G. 104; *Ex parte Tull*, L. R. 16 Eq. 97; *Ex parte Cochrane*, L. R. 20 Eq. 282; *Re Perse*, 8 Ir. Eq. 111; *Purr v. Bell*, 9 Ir. Eq. 55. See, as to receiver's remedy, whether in original action or independent proceeding, *Andrews v. Paschen*, 67 Wis. 418. As to the proper course of proceeding as to a claimant to the property, see *Daniels Ch. Pr.* 6th Ed. *1744 & 1057.

⁴ *Payne v. Baxter*, 2 Tenn. Ch. 517; *Brien v. Paul*, 3 Tenn. Ch. 357; *Russell v. East Anglian R. Co.* 3 Macn. & G. 115; *Noe v. Gibson*, 7 Paige, 515.

courts where the receiver has, in addition to the ordinary duties of receiver, taken upon himself the duties and responsibilities of a common carrier, and is conducting the business as such carrier.¹

§ 46. Not to be disturbed by strikes, conspiracies, etc.

A question has recently arisen in this country as to what extent the possession and operation of a railroad will be protected by injunction as against the employees of the receiver engaged in, or threatening to engage in, a strike with the object and intent of crippling the property in the custody of the receiver, and embarrassing the operation of the road. The law upon this subject may be regarded as somewhat in its formative state, and not yet final, but the general scope and tendency is distinctly defined and may be stated in general terms as follows:

(a) A court of equity will not enjoin the employees of a receiver from quitting his service, for the reason that such court cannot indirectly or negatively restrain the violation of a contract and thus compel an affirmative performance.

(b) A court of equity will enjoin the receiver's employees from combining and conspiring together with the object and intent, not simply of quitting the receiver's service by reason of reduction in wages, but of crippling the property in their hands and embarrassing the operation of the road, the combination and conspiracy having reference only to acts of violence and intimidation. This is based upon the principles of the common law that a conspiracy on the part of two or more with the intent by their combined power to wrong others, or to prejudice the rights of the public, is illegal, though nothing be actually done in the execution of such conspiracy.²

¹*Blumenthal v. Brainard*, 38 Vt. 402; *Sprague v. Smith*, 29 Vt. 421; *Paige v. Smith*, 99 Mass. 395; *Kinney v. Crocker*, 18 Wis. 74; *Allen v. Central R. Co.* 42 Iowa, 688; *Bryan v. Cormick*, 1 Cox, Ch. 422; *Anon.* 6 Ves. Jr. 287; *Angel v. Smith*, 9 Ves. Jr. 335; *Ranfield v. Ranfield*, 8 DeG. F. & J. 766.

²See opinion of Mr. Justice Harlan in *Arthur v. Oakes*, 63 Fed. Rep. 310, 25 L. R. A. 414, where the following

authorities are cited as sustaining the text:

Powell Duffryn Steam Coal Co. v. Taff Vale R. Co. L. R. 9 Ch. App. 331; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 54 Fed. Rep. 730, 19 L. R. A. 395; *Sherry v. Perkins*, 147 Mass. 212; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; *United States v. Kane*, 23 Fed. Rep. 748; *Emack v. Kane*, 34 Fed. Rep. 46:

Casey v. Cincinnati Typographical Union No. 3, 45 Fed. Rep. 185, 12 L. R. A. 193; *Walker v. Cronin*, 107 Mass. 555; *Callan v. Wilson*, 127 U. S. 540, 83 L. ed. 223; *Com. v. Hunt*, 4 Met. 111; *State v. Burnham*, 15 N. H. 396; *Reg. v. Parnell*, 14 Cox, C. C. 508; *Com. v. Chew*, *v. Carlisle*, Bright. (Pa.) 36; *State v. Stewart*, 59 Vt. 273; *State v. Buchanan*, 5 Harr. & J. 317; *State v. Glidden*, 55 Conn. 46; *Reg. v. Kenrick*, 5 Q. B. 49; *Carew v. Rutherford*, 106 Mass. 1; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Coeur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner*, 51 Fed. Rep. 260, 19 L. R. A. 382.

An act of displaying banners with devices as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of another was illegal at common law and in Massachusetts by statute. *Sherry v. Perkins*, 147 Mass. 213; *Walker v. Cronin*, 107 Mass. 555. And in such case the relief is not confined to a common law action, but may be by injunction. *Id.* It is a nuisance, such as a court of equity will grant relief against. *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Boston Diatite Co. v. Florence Mfg. Co.* 114 Mass. 69; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142; *Saxbey v. Easterbrook*, L. R. 3 C. P. Div. 389; *Thomas v. Williams*, L. R. 14 Ch. Div. 864; *Day v. Brownrigg*, L. R. 10 Ch. Div. 294; *Gaskins v. Balls*, L. R. 18 Ch. Div. 324; *Hill v. Hart-Davis*, L. R. 21 Ch. Div. 798; *Loog v. Bean*, L. R. 26 Ch. Div. 306.

It may be stated in general terms that any illegal interference with the receivership property, or the receiver's management thereof, or intimidation of employees or those desiring to be employed, or acts of violence against him, his receivership property, or his employees in pursuance of a conspiracy will constitute a contempt

of court and will be punishable as such.

Re Acker, 66 Fed. Rep. 290; *Arthur v. Oakes*, 63 Fed. Rep. 310, 25 L. R. A. 414; *Ames v. Union P. R. Co.* 62 Fed. Rep. 7; *Waterhouse v. Comer*, 55 Fed. Rep. 149, 19 L. R. A. 403; *Beers v. Wabash, St. L. & P. R. Co.* 84 Fed. Rep. 244; *Re Higgins*, 27 Fed. Rep. 443; *Re Doolittle*, 23 Fed. Rep. 545.

Giving notice to workmen by means of placards and advertisements that they should not become employees of a person named pending a dispute with such person is illegal and persons so offending will be restrained.

Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551; *United States v. Kane*, 23 Fed. Rep. 748; *Emack v. Kans*, 34 Fed. Rep. 46; *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 185, 12 L. R. A. 193; *Walker v. Cronin*, 107 Mass. 555.

In *Ames v. Union P. R. Co.* 62 Fed. Rep. 7, it was held to be unnecessary to enjoin an interference with the property or employees of a receiver, inasmuch as the law itself makes it a contempt to interfere with such possession.

A receiver may make a reasonable reduction in the wages of his employees. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 62 Fed. Rep. 17.

As to the right to compel employees to perform their regular and accustomed duty while in the employment of a railroad company, see *Southern California R. Co. v. Rutherford*, 62 Fed. Rep. 796.

Where employees of a receiver engaged in a general strike without grievance of their own, for the purpose of obstructing travel and hindering traffic, and their places are filled by others in order to continue the operation of the road, they will not be reinstated by order of the court. *Booth v. Brown*, 62 Fed. Rep. 794.

§ 47. Leave of court, when required.

The possession of the receiver, being the possession of the court, such possession cannot be interfered with without leave of the court appointing the receiver. The permission of the court is a prerequisite, even where the claimant claims under a right or title paramount to the receiver,¹ and while the possession does not affect the rights of a landlord, yet he cannot enforce such rights as against a receiver in possession without leave,² nor is it permissible to intercept or prevent payment to a receiver of money he has been appointed to receive.³ In general, it is the

But on proper application the court may adjust difficulties between the receiver and his employees, where in the absence of such adjustment there is danger of loss to the receivership property, or the purposes of the receivership may be frustrated. *Waterhouse v. Comer*, 55 Fed. Rep. 149, 19 L. R. A. 403.

A receiver of a railroad has no right to refuse freight from a connecting road for the purpose of preventing a strike of his own employees where the employees of the connecting road are on a strike and are attempting to boycott it. *Beers v. Wabash, St. L. & P. R. Co.* 34 Fed. Rep. 244.

Receivers of a railroad are the sworn officers of the court and their employees are *pro hac vice* officers of the court and responsible as such. *Re Higgins*, 27 Fed. Rep. 443; *Chattanooga Terminal R. Co. v. Felton*, 69 Fed. Rep. 273.

A simple request to do or not to do a thing made by one or more of a body of strikers under such circumstances as are calculated to convey a threatening intimidation, with a design to hinder or obstruct employees in the performance of their duties is not less obnoxious than the use of physical force for the same purpose, and will be punished as a contempt. *Re Doolittle*, 23 Fed. Rep. 544.

As to injunctions against strikes and proceedings under interstate commerce act, see valuable note in *Longshore Printing & Pub. Co. v. Howell*, 28 L. R. A. 464.

¹ *Day v. Postal Teleg. Co.* 66 Md. 354; *Ex parte Cochrane*, L. R. 20 Eq. 282; *De Winton v. Brecon*, 28 Beav. 203. In Iowa resisting a receiver is a criminal offense. *State v. Rivers*, 66 Iowa, 653; *Spinning v. Ohio L. Ins. & T. Co.* 2 Disney, 368; *Vermont & C. R. Co. v. Vermont C. R. Co.* 46 Vt. 792; *Angel v. Smith*, 9 Ves. Jr. 315; *Ex parte Cochrane*, L. R. 20 Eq. 282; *Russell v. East Anglian R. Co.* 3 Macn. & G. 104; *Ames v. Birkenhead Dock Co.* 20 Beav. 332; *Skinner v. Maxwell*, 68 N. C. 400. How to proceed, see *Jacobson v. Landolt*, 78 Wis. 142.

² *Sutton v. Rees*, 9 Jur. N. S. 456; *Ex parte Cochrane*, *Re Mead*, L. R. 20 Eq. 282; and the same rule applies to a claimant of real estate. *Angel v. Smith*, 9 Ves. Jr. 335; *Fort Wayne, M. & C. R. Co. v. Mellett*, 93 Ind. 535; *Potter v. Spa Spring Brick Co.* 47 N. J. Eq. 442; *Palya v. Jewett*, 32 N. J. Eq. 302.

³ *Hazelrigg v. Bronaugh*, 78 Ky. 62; *Thornton v. Washington Sav. Bank*, 76 Va. 432. Though a person interfering with property in the possession of a receiver does so under a mistake of the law, he will nevertheless be

duty of the court in all cases to protect its receiver in the possession of the property over which he is appointed.¹ And this protection extends to property that may be beyond the jurisdiction of the court, if the court has jurisdiction over the person of the offender.²

§ 48. Duty of receiver to take possession of property.

The receiver is sometimes empowered by statute with power to obtain possession of property over which he has been appointed, and on refusal by the party in custody to surrender a warrant may be issued for the purpose of enforcing the orders of court,³ but, whether so empowered or not, it is the duty of the receiver to take possession of all the property covered by the order of his appointment, and he cannot assume a position of indifference and allow persons holding property to deliver it to him or not as they see fit. He must use active diligence on his part to secure possession.⁴

chargeable with the costs of the proceedings against him for contempt, though he may be excused from further punishment. *Noe v. Gibson*, 7 Paige, 518.

¹ *Moore v. Mercer Wire Co.* (N. J.) 15 Atl. 805, 787. Lord Romilly, in *De Winton v. Mayor*, 28 Beav. 200, says: "I apprehend this is clear: that the court never allows any person to interfere, either with money or property in the hands of its receiver, without its leave, whether it is done by the consent or submission of the receiver or by compulsory process against him. The court is obliged to keep a strict hand over property in the hands of a receiver, or which by virtue of the order of the court may come in his hands, in order to preserve entire jurisdiction over the whole matter and to do that which is just in the case between the parties."

See also *Ames v. Birkenhead Dock Co.* 20 Beav. 322; *Brooks v. Greathead*, 1 Jac. & W. 178; *Wordsle v. Lloyd*, 2 Moll. 288.

² *Chafes v. Quidnick Co.* 18 R. I. 442; *Sercomb v. Catlin*, 128 Ill. 556.

³ *Noble v. Halliday*, 1 N. Y. 380.

Withholding contracts from a receiver of one of the contracting parties cannot be justified upon the ground that they are held as security for commissions earned by the persons who procured them, and wages due them, where such commissions are not payable until collections have been made on the contracts, and no wages are in fact due. *Ex parte Corran* (Cal.) 41 Pac. 464.

Withholding contracts from the receiver of one of the contracting parties cannot be justified on the ground that they cannot be utilized by the receiver, or that the withholding of them will not injure him or the contracting party. *Ex parte Corran* (Cal.) 41 Pac. 464.

⁴ *Clapp v. Clapp*, 49 Hun, 195.

A receiver is not required to apply to the court to aid him in obtaining possession of property which should be surrendered to him. *Filkins v. Adams*, 60 Ill. App. 410.

But a receiver of an insolvent cannot claim possession of land in which the insolvent had an interest under contract which did not pass the title, in the absence of a provision therein for possession in advance of the conveyance of title;¹ nor is he entitled to the possession of a fund which, prior to his appointment, has been placed in the hands of a trustee, for special purposes, such as a safety and tontine pension fund in case of an insurance company.² Where property prior to the appointment has been fraudulently assigned to an insolvent assignee, the plaintiff should have the receivership extended to such assignee,³ and where complaint is made of an act of the defendant after the decree appointing a receiver but before the appointment is completed, the proper persons to make complaint are the parties to the suit and not the receiver.⁴

While the decisions are not entirely harmonious, the weight of authority, as well as reason, is in effect that where the receiver obtains possession such possession will be protected in foreign jurisdictions. If he obtains possession of property in the state of his appointment and takes it to another state for a lawful purpose, his possession will be protected in the latter state as against creditors residing in such state.⁵

¹ *Stratton v. California Land & T. Co.* 86 Cal. 853.

² *Re Home Provident Safety Fund Asso.* 129 N. Y. 288, reversing 89 N. Y. S. R. 437.

³ *Cassilear v. Simmons*, 8 Paige, 278.

The court cannot make a summary order on an assignee to turn over property to a receiver, the assignee acting under orders of another court. *Com. v. Order of Vesta*, 156 Pa. 531.

⁴ *Fox v. Toronto & N. R. Co.* 29 Ch. (Ont.) 11.

⁵ *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.* 108 Ill. 317. Where a receiver takes possession of property within the jurisdiction of the court appointing him he becomes vested with a special property in it similar to that of a sheriff. *Boyle v. Twunee*, 9 Leigh, 158; *Singerly v. Fox*,

75 Pa. 112; *Dick v. Bailey*, 2 La. Ann. 974; *Killmer v. Hobart*, 58 How. Pr. 452; *Cagill v. Wooldridge*, 8 Baxt. 580. Where property has once vested in an assignee or receiver by the law of the state where the property is situated, the law of another state will not divest him of it if he should take it into such state in the performance of his duty. A receiver appointed by a court in such a case stands in the same position as an assignee or trustee in insolvency. *Pond v. Cooke*, 45 Conn. 126.

See also *Cammell v. Sewell*, 5 Hurlst. & N. 728; *Clark v. Connecticut Peat Co.* 35 Conn. 303; *Taylor v. Boardman*, 25 Vt. 581; *Orapo v. Kelly*, 83 U. S. 16 Wall. 610, 21 L. ed. 430; *Waters v. Barton*, 1 Cald. 450; *Cagill v. Wooldridge*, 8 Baxt. 580; *Mc-*

Courts will even punish for contempt persons who are not parties to the suit for interfering with the property in the receiver's possession.¹ While the receiver is not permitted to take possession of the receivership property until he has given bond, yet if the possession has been ordered the receiver will be protected.²

§ 49. As against public improvements.

While the court zealously guards the possession of receivership property in the interest of the parties to the litigation, yet it will not permit the possession of the receiver to be an obstacle to a public improvement, as, for instance, to prevent the crossing of a road in the hands of a receiver by the tracks of another road.³ The court otherwise would overrule the laws of the state and make its will superior to the sovereign power of a co-ordinate branch of the government.

§ 50. Duty as to opening a new business.

The receiver's possession of property does not justify him, without an order of court expressly authorizing him, or the business is such as to imperatively require it, to open a business with the property or moneys in his hands.⁴ As we have seen, the ordinary duty of the receiver relates to the preservation and safe keeping of the property or fund, and he has no duty which re-

Alpin v. Jones, 10 La. Ann. 552. But see *contra*, *Humphreys v. Hopkins*, 81 Cal. 551, 6 L. R. A. 792. This case is apparently against the weight of authority, and was by a divided court, and against principles previously enunciated by the same court. *Low v. Burrows*, 12 Cal. 188; *Lewis v. Adams*, 70 Cal. 403.

¹ *Helmors v. Smith*, L. R. 35 Ch. Div. 449. In this case a former clerk by means of a circular to the customers interfered with the business of the receiver as manager and was committed for contempt.

² *Morrison v. Skerms Iron Works Co.* 60 L. T. N. S. 588.

³ *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 26 Fed. Rep. 8. In this case Mr. Justice Brewer says: "It is not gracious in the federal court which has taken possession of property by its receivers to make that possession an obstacle to any proposed public improvement. We should, so far as lies in our power, extend every facility to every proposed public improvement, simply aiming to preserve the rights which attach to property while it is in our possession, and that is all."

⁴ *Terry v. Martin* (N. M.) 32 Pac. 157.

quires him to build up a business for the benefit of the parties in interest. Of course this restriction has no application to the business of a going concern where the chief value arises from its being such, as in the case of a newspaper; nor to a business *quasi* public in its nature where public interests are concerned.

§ 51. As to tenants.

In a case where the receiver is to collect the rents and profits the proper course is to apply for an order on the tenants in possession to attorn, and it is not necessary that they should be parties to the suit,¹ but in such case the tenants are not liable for costs.² The power of the court as to the property carries with it the implied power to make all necessary and proper orders upon those who are in custody or charge not inconsistent with their rights of possession, or valid contracts relating thereto.

§ 52. To whom restored.

After the dismissal of a bill for want of jurisdiction, property left in the hands of a receiver in such case must be restored to the party from whom possession was taken, though the opposing party may have a good claim to the possession by reason of a purchase and possession before the bill was filed, and in such case it makes no difference to the receiver that the party to whom he restores the property is insolvent.³ In the very nature of the case the court, without an adjudication, cannot return the property to a person other than the one from whom the possession was taken.

§ 53. Extent of.

A receiver appointed upon the application of a secured creditor has no right to the custody of funds not arising from the property which has been pledged as security, and which may be applied upon the claims of general unsecured creditors,⁴ if any. The

¹*Reid v. Middleton*, Turn. & R. 455.

²*Hobhouse v. Holcombe*, 2 DeG. & S. 208.

³*Warren v. Bunch*, 80 Ga. 124.

⁴*Wormser v. Merchants' Nat. Bank*, 49 Ark. 117. The right of custody extends only to the property which is the subject-matter of the litigation. In a proceeding under a general cred-

itors' bill of course the receiver is entitled to the entire property, as in the case of bankruptcy and insolvency, or proceedings to wind up banks, etc. *Noyes v. Rich*, 52 Me. 115. But in case of a mortgage foreclosure the right to possession extends only to the property mortgaged. *Id.*

possession in such case is coextensive with the rights or lien of the plaintiff, and as to the owner of the property or creditors cannot go beyond that.

§ 54. As to taxes.

It has been held that the possession of the receiver does not prevent the seizure and sale of such property for unpaid taxes, and in such case if neither the bailiff nor the purchaser was aware until after the sale that it was in the hands of a receiver, and in fact had been informed to the contrary in good faith by the person in charge, the sale will be upheld.¹ The general rule is, however, that the receiver takes the property subject to all existing liens, and such liens are unaffected thereby, and this rule is especially true in the case of taxes where the lien therefor is paramount to all other liens. But notwithstanding the paramount lien, the officer is not entitled to levy on and sell receiver-ship property. It is his duty to intervene and set up his lien.²

¹*Gibson v. Lovell*, 19 Grant Ch.(Ont.) 197.

²In *King v. Wooten*, 2 U. S. App. 651, the court say: "The recognized mode of protecting property in the custody of the court is by treating as null all attempts to withdraw it therefrom without leave of the court, whether by color of other legal process or otherwise than by order of the court in possession, and when necessary such possession is protected by proceedings to attach and punish for contempt all persons who persist in attempting to disturb the possession of the court."

Mr. Ch. J. Fuller, in *Re Tyler*, 149 U. S. 164, 183, 87 L. ed. 689, 695, says: "The levy of a tax warrant, like the levy of an ordinary *fiery facias*, sequesters the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by

and under the sanction of the court. It is the duty of the court to see to it that it is done; and a seizure of the property against its will can only be predicated on the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

Prince George's County Comrs. v. Clarke, 36 Md. 206; *Greeley v. Provident Sav. Bank*, 98 Mo. 458; *Central Trust Co. v. New York C. & N. R. Co.* 110 N. Y. 250, 1 L. R. A. 260; *Yuba County v. Adams*, 7 Cal. 85.

Philadelphia & R. R. Co. v. Com. 104 Pa. 80; *Union Trust Co. v. Weber*, 96 Ill. 346; *Re North American Gutta Percha Co.* 17 How. Pr. 549; *Gere v. Dibble*, 17 How. Pr. 81; *Rich v. Loutrill*, 18 How. Pr. 121; *Lorch v. Aultman*, 75 Ind. 162.

An attempt to seize or sell lands in the custody of receivers of a railroad company, for taxes, without the consent of the court appointing such receivers, may be enjoined. *Oakes v. Myers* 86 Fed. Rep. 807.

§ 55. As to set-off.

The receiver has only the rights of the company over whose property he is placed, and all property rights pass to him as they existed prior to his appointment and are subject to the same equities,¹ and the right of set-off exists against a note in the hands of a receiver of an insolvent corporation to the same extent as would have existed against it in the hands of the corporation.² The receiver can have no greater or better rights than the debtor had.³ In a proceeding by receivers if the defendant is entitled to a set-off and holds security from the debtor he must first exhaust the security and prove up the balance only, and this is based upon the principle that equality is equity.⁴ The right of set-off does not exist, however, unless the indebtedness and set-off grow out of the same right. Thus if the receiver sues to recover an unpaid subscription to the capital stock of a corporation, and the set-off grows out of a deposit in the bank, the capital stock in

¹ *Falkenbach v. Patterson*, 43 Ohio St. 359; *Bell v. Shibley*, 33 Barb. 610; *Coope v. Bowles*, 42 Barb. 87; *Lincoln v. Fitch*, 42 Mo. 456.

² *Berry v. Brett*, 6 Bosw. 627; *Holbrook v. American F. Ins. Co.* 6 Paige, 220; *Colt v. Brown*, 12 Gray, 233; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059; *Armstrong v. Warner*, 49 Ohio St. 376, 17 L. R. A. 466; *Hade v. McVay*, 31 Ohio St. 281.

³ *Wisconsin M. & L. F. Ins. Co. Bank v. Manistee Salt & L. Co.* 77 Mich. 76; *Farrington v. Sexton*, 43 Mich. 454; *Lentz v. Flint & P. M. R. Co.* 53 Mich. 444; *Byles v. Kellogg*, 67 Mich. 318.

See also notes to following § 56.

⁴ *State Bank v. Bank of New Brunswick*, 3 N. J. Eq. 266.

In *Scott v. Armstrong*, 146 U. S. 449, 36 L. ed. 1059, it was held that the ordinary equity rule of set-off in case of insolvency is that where the mutual obligations have grown out of the same transaction, insolvency, on the one hand justifies the set-off of the

debt due on the other; and this rule applies to a receiver of an insolvent national bank, as where a customer of a bank gives his note for borrowed money due at a future day and deposits the amount borrowed to be drawn against, any balance remaining due him on the dissolution of the bank and the appointment of a receiver is a proper off-set to the note to the extent it may go. Cf. *Adams v. Spokane Drug Co.* 57 Fed. Rep. 889, 23 L. R. A. 834; *Bell v. Hanover Nat. Bank*, 57 Fed. Rep. 822; *Snyder v. Armstrong*, 37 Fed. Rep. 18; *Yardley v. Clothier*, 49 Fed. Rep. 337; *Armstrong v. Warner*, 21 Ohio L. J. 136, 27 Ohio L. J. 100. The same rule is applicable in a suit by a receiver upon a premium insurance note. *Berry v. Brett*, 6 Bosw. 627. And upon a note due a bank. *Van Dyck v. McQuade*, 85 N. Y. 616; *Lanier v. Gayoso Sav. Inst.* 9 Heisk. 506; *Stone v. Dodge*, 96 Mich. 514, 21 L. R. A. 280; *Van Wagoner v. Paterson Gaslight Co.* 23 N. J. L. 283.

such case being a trust fund for the benefit of all creditors, the right of set-off does not exist.¹

Where the receiver is directed to pay a certain person an amount of money, the receiver has no right to offset his individual claims against such person.² This principle is based on the fact that the receiver holds the funds for the court, and no discretion is allowed him as to any application or disposition thereof; he holds subject to the order of court, to be paid out as the court shall adjudge.

§ 56. As to exemptions.

As we have seen, the taking of possession of property by a receiver does not destroy existing rights in such property, and therefore does not deprive the debtor of his right to exemption given him by the statute.³

§ 57. As to executors and administrators.

As a rule an administrator is entitled to the possession of the property of the intestate held by him at the time of his death, but where, prior to administration, the property had been placed in the hands of a receiver on the application of an adverse claimant, the receiver will hold possession.⁴

¹ *Williams v. Traphagen*, 38 N. J. Eq. 57.

² *Johnson v. Gunter*, 6 Bush. 534.

³ *Weinrich v. Koelling*, 21 Mo. App. 133. The claim for exemption should be made when the property is seized, or threatened to be seized. It is held that an individual partner has no claim for exemption on partnership property.

Tillotson v. Wolcott, 48 N. Y. 188; *Finnin v. Malloy*, 1 Jones & S. 382; *Cooney v. Cooney*, 65 Barb. 524; *Sands v. Roberts*, 8 Abb. Pr. 343; *Hudson v. Plets*, 11 Paige, 180; *Andrews v. Rowan*, 28 How. Pr. 126.

⁴ *Johnson v. Stewart*, 41 Ga. 549.

CHAPTER V.

RECEIVER'S TITLE.

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| § 58. Defined. | § 64. To choses in action generally. |
| § 59. By possession. | § 65. To real estate in foreign states. |
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§ 58. Defined.

The word "title" as used in receivership matters has various significations, and has been the occasion of no little confusion by those using the term. "Title in modern usage points to the rights rather than the actual ownership," says Mr. Abbott, "and to say that title is such a claim to the exclusive control and enjoyment of a thing as the law will recognize and enforce, perhaps expresses the idea conveyed by the modern use of the word." The receiver's title has reference more particularly to the right to the possession and control of the property, real or personal, for the time being, rather than to the ownership thereof. There are cases in matters of insolvency and winding up proceedings where the absolute legal title becomes vested in the receiver, and not unfrequently in the earlier practice the owner was required to execute and deliver to the receiver a formal conveyance of the property owned by him at the date of granting the receivership. In other cases the receiver is the mere custodian for the time being of the property of the debtor, charged with the duty of caring for the same, collecting the rents in case of real estate, and the income and profits in case of personal property, and transferring the title as an officer of and as ordered by the court. In this latter case the receiver, strictly speaking, has no title to the property, and where the title of such a receiver is referred to it has reference solely to his right of possession under the order of court, and as an officer of the court, the scope of his authority in all cases being measured by the order of his appointment, having reference to the character of the property, and the

rights therein of the plaintiffs at whose instance he is appointed, and the owner over whose property he is placed in custody. In many cases the actual manual possession of the property is not intended to be placed in the receiver, but he is only charged with the collection of the rents and profits, and in such case his possession is only constructive, and rights so far as third parties are concerned are largely dependent on the doctrine of *lis pendens*.¹

¹In *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 228, 34 L. ed. 236, 341, 342, Mr. Justice Gray says: "A receiver derives his authority from the act of the court appointing him and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property." *Skip v. Harwood*, 8 Atk. 564; *Anon.* 2 Atk. 15; *Winstall v. Sampson*, 53 U. S. 14 How. 52, 14 L. ed. 322; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Maynard v. Bond*, 67 Mo. 315; *Heiman v. Fisher*, 11 Mo. App. 275. In *Yeager v. Wallace*, 44 Pa. 294, it was held that a receiver of partnership effects could not maintain trover for the converted assets of the firm before the appointment, on the ground that the receiver does not become the legal owner of the property which he is required to take in charge. The appointment does not transfer to the receiver the legal rights of the partnership in any of their choses in possession or in action. *Wilson v. Allen*, 6 Barb. 545. In *Mann v. Pents*, 2 Sandf. Ch. 257, it was held that the effect of the order was to vest the property in the receiver as effectually in equity as if an assignment had been made in due form. The prop-

erty is transferred by operation of law by means of the order of the court; and equity looking at the substance will hold the transfer accomplished which has been decreed. In *re Eagle Iron Works*, 8 Paige, 386; *Eldred v. Hall*, 9 Paige, 640. In a foreclosure proceeding in *Harland v. Bankers & M. Teleg. Co.* 32 Fed. Rep. 305, it was held that a receiver *pendente lite* is a mere custodian of the mortgaged property. And not being appointed under a statute acquired no title to the property which belonged to the mortgagee.

In *Union Trust Co. v. Weber*, 96 Ill. 346, it is said: "We are aware of no rule of law or any adjudged case independent of a statute that holds the appointment of a receiver transfers the title of real or personal property to the person thus appointed. Nor do we conceive by what means such an appointment can have that effect. That officer by his appointment is authorized to take and hold possession of property under the control and direction of the court." In *Atty. Gen. v. Atlantic & Mut. L. Ins. Co.* 100 N. Y. 279, it was held that under the New York statute (Act 1869, § 7) the title to real estate of the debtor became vested in the receiver by his appointment, as well as personal property. And if this were not true the receiver is the holder of the equitable title accompanied by possession, and a conveyance could be ordered by the court if necessary. See also *Decker*

§ 59. By possession.

In the absence of a formal transfer or assignment a receiver *pendente lite* acquires no title in the sense of ownership to the receivership property, and his right is one merely of possession as an officer of court, the legal title of the owner remaining unaffected until transferred by operation of law by decree and sale.¹

v. Gardner, 124 N. Y. 334, 11 L. R. A. 480; *Wing v. Dias*, 15 Hun, 190; *Osgood v. Maguire*, 61 N. Y. 524; *Owen v. Smith*, 31 Barb. 641; *Atlas Bank v. Nahant Bank*, 23 Pick, 480. The power of the court to invest the receiver with the legal as well as the equitable title would seem to be unquestioned. *Atty. Gen. v. Atlantic & Mut. L. Ins. Co.* 100 N. Y. 279; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Hoyt v. Thompson*, 5 N. Y. 320; *Scott v. Elmore*, 10 Hun, 68; *Union Trust Co. v. Weber*, 96 Ill. 348; *Adams v. Howard*, 22 Fed. Rep. 656; *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 409; *Noyes v. Rich*, 52 Me. 115; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1. In *Coates v. Cunningham*, 80 Ill. 467, the court say: "The appointment of a receiver does not determine any rights nor affect the title of either party in any manner whatever. He is the officer of the court, and his holding is the holding of the court for him, from whom the possession was taken. He is appointed on behalf of all parties, and his appointment is not to oust any party of his rights to the possession, but merely to retain it for the benefit of the party ultimately entitled; and where he is ascertained the receiver will be considered as his receiver. *Ellicott v. Warford*, 4 Md. 80; *Re Colvin*, 2 Md. Ch. 280; *Porter v. Williams*, 9 N. Y. 142.

Real estate is vested in the receiver only by a conveyance to him. *St. Louis & S. Coal & M. Co. v. Sandoval*

Coal & M. Co. 111 Ill. 32; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *In re Colvin*, 3 Md. Ch. 278; *Williamson v. Wilson*, 1 Bland. 418. In *Tillinghast v. Champlin*, 4 R. I. 173, it was held that a receiver of a dissolved copartnership appointed by a court of equity is invested with the whole equitable title to the partnership property, without an assignment; and in *Fincke v. Funke*, 25 Hun, 616, it was held that a receiver in a partnership case *pendente lite* has no powers except such as have been conferred upon him by the order, and is a common law receiver whose duty it is to merely protect the fund pending litigation. The order appointing him makes no change in the title. *Keeney v. Home Ins. Co.* 71 N. Y. 396. In proceedings supplementary to execution, however, and in cases of embarrassed or insolvent corporations, and statutory proceedings, his powers are greater.

¹ *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480; *Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 372, 375; *Keeney v. Home Ins. Co.* 71 N. Y. 396; *Corn Exchange Bank v. Blye*, 101 N. Y. 303; *Devlin v. New York*, 4 Miss. 106; *Wilson v. Allen*, 6 Barb. 545; *Leonard v. Wallace*, 44 N. Y. 294; *Harland v. Bankers' & M. Teleg. Co.* 82 Fed. Rep. 305; *Skip v. Harwood*, 3 Atk. 564; *Gresley v. Adderley*, 1 Swanst. 573; *Thomas v. Brigstack*, 4 Russ. 65; *Bertrand v. Davies*, 31 Beav. 436; *Green v. Bostwick*, 1 Sandf. Ch. 185; *Singerly v. Fox*, 75 Pa. 112.

While receivers of this class have many powers and duties peculiar to themselves they are such only as flow from the nature and character of the property committed to their charge. *Pendente lite* receivers of corporations do not represent the corporations in their individual or personal character; nor do they supersede the corporations in the exercise of their corporate functions, except in so far as the custody and preservation of the property is concerned. The power of the court to protect the receiver's possession is based upon the fact that the fund or property is *in custodia legis* rather than the fact of title or ownership. The possession, however, will be protected as jealously as if the absolute title was vested in the receiver, and it is this condition of protection that is sometimes referred to as the receiver's title. It is true that the receiver may be considered as having a special property in the fund or *res* in the sense that a sheriff, or other officer is said to have, but in all such cases the officer's powers and duties in relation to the property are referrable to the peculiar nature of his possession rather than to any interest in or title to the property.

§ 60. In supplementary proceedings.

The code of procedure in many of the states, regulating proceedings supplementary to execution, vests the title of the judgment debtor to both real and personal property in the receiver, and no formal assignment is required. The receiver in such case stands in the position of a trustee for the creditors of all the property the debtor held at the time of the appointment.¹ The title

While the appointment of a receiver may not convey the title yet the appointment is in the nature of an injunction or a writ of sequestration, preventing any alienation of or interference with the property without the consent of court. Thus a lease by a party to the suit of land in the hands of a receiver made to a third party, however valid between the parties, confers no rights upon the assignee. *Thornton v. Washington Sav. Bank*, 76 Va. 432.

A receiver of the property of a beneficiary may reach the proceeds of real estate devised in trust to convert

and distribute. *Re Beecher's Estate*, 19 N. Y. Supp. 971.

When a person wrongfully obtains payment of a debt adversely to the rights of a receiver he will be ordered to pay the same to the receiver and in default will be committed. *Parker v. Pocock*, 80 L. T. N. S. 458.

¹ *Porter v. Williams*, 9 N. Y. 142; *Manning v. Evans*, 19 Hun, 500; *Wring v. Disse*, 15 Hun, 191; *Fessenden v. Woods*, 3 Bosw. 550; *Atty. Gen. v. Atlantic Mut. Ins. Co.* 100 N. Y. 279.

As to the title of receivers independent of statutes, see *Wilson v. Wil-*

of the receiver in such a case relates to such indebtedness as may be due the debtor at the time of his appointment and not such as may become due thereafter,' and the same rule applies in the case of a receiver of a corporation, as to property subsequently acquired by the corporation.² And where the vendor of merchandise reserves title thereto until the payment of the purchase price, a receiver of the vendee obtains no title to such merchandise and can convey no title thereto.³

§ 61. In statutory proceedings.

Under statutes designed to facilitate the dissolution and winding up of insolvent corporations, both in this country and in England, provision is usually made for the appointment of statutory receivers, with enlarged powers and duties. As a rule this class of receivers are invested by law with the title to both the real and personal property of the insolvent corporation, independent of any assignment or formal transfer.⁴ No general rules, of course, can be laid down concerning statutory proceedings, as all such are governed by the peculiar provisions of the statutes under which the appointment is made and there is no uniformity in their provisions. In many states the statute vests the legal title to receivership property in the receiver under supplementary proceed-

son, 1 Barb. Ch. 592. Cf. *Mann v. Pentz*, 2 Sandf. Ch. 257; *Wilson v. Allen*, 6 Barb. 542; *Scouton v. Bender*, 8 How. Pr. 185.

This subject will be further discussed under the title "Supplementary Proceedings."

¹ *Willison v. Salmon*, 45 N. J. Eq. 257. It must be a *debitum in presenti*. In this case the contract was incomplete.

² *Gabert v. Olcott* (Tex.) 22 S. W. 286 (not officially reported, and reversed in 86 Tex. 121, on other grounds *sub nom Olcott v. Gabert*).

³ *Sayles v. National Water Purifying Co.* 41 N. Y. S. R. 856, affirmed without opinion in 141 N. Y. 603. The basis of this decision is that the receiver gets no better title than the

judgment debtor has in the estate of which he takes possession (*Bell v. Shibley*, 38 Barb. 614) and that the receiver's rights in the property are subject to all the equities existing against the debtor. *Hyde v. Lynde*, 5 N. Y. 392; *Ford v. Cobb*, 20 N. Y. 348.

⁴ *Atty. Gen. v. Atlantic Mut. L. Ins. Co.* 100 N. Y. 279; *Atty. Gen. v. Continental L. Ins. Co.* 28 Hun, 360, affirmed in 93 N. Y. 630; *Osgood v. McGuire*, 61 N. Y. 524; *Re Berry*, 26 Barb. 55; *People, Atty. Gen., v. Security L. Ins. & A. Co.* 23 Hun, 596, 71 N. Y. 226; *Morgan v. New York & A. R. Co.* 10 Paige, 290; *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480; *Porter v. Williams*, 9 N. Y. 142.

See further chapter on Corporations,

ings, as seen in the preceding section, but it will be observed that in such case the receiver's title depends upon the provisions of the statute.

§ 62. In actions *pendente lite*.

Receivers *pendente lite* are mere temporary officers of the court and do not possess the powers of a permanent receiver unless specially conferred upon them by the court. They possess no legal powers, and their functions are limited to the care and preservation of the property or fund committed to their charge.¹ The power of appointment of a receiver of this character is an incident to the jurisdiction of a court of chancery, and is unaffected by the character of the parties before it, whether an individual or a corporation, or by the nature of the property,² and is usually brought into exercise in mortgage foreclosure cases. While this class of receivers have many duties and powers peculiar to themselves they are such only as flow from the nature and character of the property committed to their charge. Of course, in case of the foreclosure of railway mortgages the powers and duties of the receiver are increased by reason of the public nature of the property and the franchises involved, but the title of the receiver is essentially the same in all cases.

§ 63. To choses in action due from nonresidents.

A court of equity under its general powers and independent of statutory authority has no power to compel a general assignment of all the property, or the choses in action, of a debtor in an action by a judgment creditor to collect his judgment, nor does the title to choses in action due the debtor from persons in a foreign jurisdiction pass to a receiver by virtue of his appointment, nor will a receiver have power to bring suits on such choses in action in a foreign jurisdiction.³ As will be seen in the fol-

¹ *Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 372; *Keeney v. Home Ins. Co.* 71 N. Y. 396.

² *United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 478.

³ *Amy v. Manning*, 149 Mass. 487; *Harvey v. Varney*, 104 Mass. 436;

Booth v. Clark, 58 U. S. 17 How. 322, 15 L. ed. 164; *Brigham v. Luddington*, 12 Blatchf. 237; *Yeager v. Wallace*, 44 Pa. 294.

Prior to the passage of the Massachusetts statute of 1884, a creditor's suit under the statute could not be maintained against the judgment

lowing section, the common law of New York is directly contrary to the principles here laid down. Under the provisions of the code of procedure in that state relating to proceedings supplementary to execution it is not within the power of the court to order the debtor to execute deeds of conveyance for real estate situated in another state.¹

§ 64. To choses in action generally.

The rule that a receiver's title dates from the time of granting the order for his appointment does not apply to choses in action in all cases; thus, where a debtor made an assignment for the benefit of his creditors and subsequently a creditor of such debtor filed a bill to set aside the assignment, in which action a receiver was appointed, and subsequently a decree was rendered setting the assignment aside, it was held that the receiver's title to certain promissory notes given to and held by the assignees, dated from the time of filing the bill to set aside the assignment; that the filing of the bill created a lien on the choses in action in the hands of the assignees from that date,² though ordinarily the

debtor and an assignment compelled to be made by him of his choses in action due from non-resident parties, without making such persons parties defendant. *Phœnix Ins. Co. v. Abbott*, 127 Mass. 558. The statute (1884) in substance provides that the fact that the property sought to be reached and applied is in the hands, possession or control of the debtor independently of any other person, or that it is not within the state, shall not prevent the plaintiff from maintaining his bill. Since the passage of this statute it has been held that such intangible property as letters patent in the possession of the debtor can be reached without making any other person a party defendant to the suit, and both before and since the passage of the statute promissory notes have been reached by this process without making the makers of the notes parties. *McCann v. Randall*, 147 Mass. 81; *Wilson v.*

Martin-Wilson Automatic Fire Alarm Co. 149 Mass. 24; *Amy v. Manning*, 149 Mass. 457.

¹ *Smith v. Tabor*, 42 Hun, 22. It seems that this inability of the court arises by reason of the provisions of the code vesting the real estate in the receiver from the time of his filing with the clerk of the county where the property is situated, a copy of the order; this could only be construed with reference to property in New York. It was otherwise under the code prior to 1877. *Fenner v. Sanborn*, 87 Barb. 610.

² *Clark v. Brockway*, 1 Abb. App. Dec. 851.

Receivers appointed by the court upon a creditors' bill, to take, receive and hold property assigned by an insolvent bank, acquire all the rights of the assignees under their assignment. *Hill v. Western & A. B. Co.* 86 Ga. 284.

receiver's title dates from the time of granting the order, and not from the time of giving the bond,¹ or of filing the bill.

§ 65. To real estate in foreign states.

While the receiver does not become vested with title to real estate situated in a foreign state by virtue of his appointment as receiver, yet the inherent powers of an equity court are such that where the court has jurisdiction of the person, it may require him to transfer to the receiver any property the judgment debtor may own in a foreign state, where such transfer is necessary to the payment of his debts.² The principles here announced, it will be observed, are directly opposed to those laid down in a preceding section in force in Massachusetts. In England where the court has jurisdiction of the person, and while it cannot send its officers into a foreign jurisdiction to carry into effect its orders, yet it has power to enforce obedience to its orders by punishment for contempt;³ and this power exists where the person or corporation committing the alleged contempt is not a party to the suit, provided such party is within the jurisdiction of the court appointing the receiver.⁴

¹ *Maynard v. Bond*, 67 Mo. 315; *Pope v. Ames*, 20 Or. 199; *Re Christian Jensen Co.* 128 N. Y. 550; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Porter v. Williams*, 9 N. Y. 142; *Van Alstyne v. Cook*, 25 N. Y. 489; *Bocker v. Torrance*, 31 N. Y. 681. It would seem, however, that as to choses in action not subject to levy and sale, the filing of this bill creates a lien and the rights of the parties relate to that date. *Clark v. Brockway*, *supra*.

² *Mitchell v. Bunch*, 2 Paige, 606; *Le Loy v. Rogers*, 3 Paige, 237; *Bailey v. Ryder*, 10 N. Y. 623; *Fenner v. Sanborn*, 37 Barb. 610; *Smith v. Tozer*, 42 Hun, 22. And see *Newton v. Bronson*, 18 N. Y. 587; *Gardner v. Ogden*, 23 N. Y. 327; *Williams v. Fitzhugh*, 37 N. Y. 444; *Shattuck v. Cassidy*, 3 Edw. Ch. 152. (See limitation by Code of 1877, chap. 417, as determined in *Smith*

v. Tozer, *supra*). *Penn v. Lord Baltimore*, 1 Ves. Sr. 444; *Farley v. Shippen*, Wythe, 135; *Toller v. Carteret*, 2 Vern. 494; *Hughes v. Hall*, 5 Munf. 431; *Oronstoun v. Johnston*, 3 Ves. Jr. 170, 5 Ves. Jr. 277; *Kildare v. Eustace*, 1 Vern. 419; *Derby v. Athol*, 1 Ves. Sr. 208; *Guerrant v. Fowler*, 1 Hen. & M. 5; *Massee v. Watts*, 10 U. S. 6 Cranch, 148, 3 L. ed. 181; *Ward v. Arredondo*, 1 Hopk. Ch. 213.

³ *Langford v. Langford*, 5 L. J. Ch. N. S. 60; *Richards v. People*, 81 Ill. 551; *Chafee v. Quidnick Co.* 18 R. I. 442; *Dehon v. Foster*, 4 Allen, 545; *Vermont & C. R. Co. v. Vermont C. R. Co.* 46 Vt. 792.

⁴ *Sercomb v. Catlin*, 128 Ill. 556. And it is not necessary that the receiver shall have reduced the property to his possession. *Hazelrigg v. Bronaugh*, 78 Ky. 62; *Richards v. People*, 81 Ill. 551.

§ 66. To real estate generally.

• In proceedings supplementary to execution, where the debtor has made no conveyance of his real estate to the receiver, pursuant to an order of court, and independent of statutory enactment, the receiver takes no title in the sense of ownership to real estate of the debtor. In this class of proceedings the receiver's title is a qualified title in the nature of a security for the plaintiff of the judgment, and such title thus qualified and limited, does not exhaust the title of the judgment debtor. Subject to the right of the receiver to resort to the land to pay the judgment the title remains in the judgment debtor, and a conveyance by him transfers the title subject to the claim of the receiver.¹ The court has

¹*Scott v. Elmore*, 10 Hun, 68; *Wilson v. Wilson*, 1 Barb. Ch. 572; *Chautauque County Bank v. Risley*, 19 N. Y. 375; *Moak v. Coates*, 38 Barb. 498; *St. Louis & S. Coal & M. Co. v. Sandoval Coal & M. Co.* 111 Ill. 82. But see *Porter v. Williams*, 9 N. Y. 142, as to application of the then existing code.

A land company having conveyed its lands by trust deed to secure its preferred stockholders, allowed its equity to be sold on execution and the time for redemption to pass, all before the filing of a bill in which a receiver of the company was appointed. Held, that the receiver took nothing by his appointment nor by conveyance from the company. *Fitch v. Wetherbee*, 110 Ill. 475.

The appointment of a receiver only invests him with the title to such real estate as the debtor has within the state. *Smith v. Tozer*, 42 Hun, 23. See Code Civ. Proc. § 2468.

A receiver derives his authority from the court appointing him and not from the act of the parties at whose suggestion he is appointed. The effect is to put the custody in his hands as an officer of the court for the benefit of the party entitled to it, but does not change the title or even right of possession.

Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341; *Maynard v. Bond*, 67 Mo. 815; *Heiman v. Fisher*, 11 Mo. App. 275.

A receiver of a corporation is not authorized to take possession of chattel property formerly owned by the company, but which has been sold on execution against it before his appointment.

McIlrath v. Snure, 22 Minn. 391.

The refusal by the defendant in a creditor's bill, to make an assignment to the receiver, in pursuance of an order of court, is no ground for a refusal by the master, to decide that the property is within the control of the defendant and to order it to be delivered to the receiver.

Eldred v. Hall, 9 Paige, 640.

Under the usual order appointing a receiver, in a creditor's bill, the debtor is bound to execute to the receiver a formal assignment of all his property, although he has stated under oath that he has no property.

Chipman v. Sabbaton, 7 Paige, 47.

Where a receiver was appointed in a case in which a large number of important interests were held by various parties,—held, that as he became vested with the title of all the property involved in the suit, by virtue of

jurisdiction of course by its decree to divest the title of the debtor and vest the same in a purchaser under the decretal sale. In New York the rule is that a receiver of an insolvent person or corporation takes title without a formal conveyance. This however is by reason of the statute.¹ In a proceeding to dissolve a partnership the receiver takes the equitable title without an assignment.²

§ 67. Extent of.

The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is and that any defense which would have been good against the individual or corporation may be asserted against the receiver.³ But to this rule there is a well recognized exception which permits a receiver of an insolvent individual or corporation in the interest of creditors to disaffirm dealings of the debtor in fraud of their rights,⁴ but as we have seen elsewhere this rule is dependent upon statutory powers and not upon the inherent equity powers of the court.⁵ Under the Michigan voluntary assignment law the receiver gets no better title than the assignee had.⁶ In general the

the decree appointing him, he was entitled to the carriage of the decree into the master's office to compel the delivery of the property to him and that he was responsible for the exercise of his best judgment and good faith to all parties interested and was not to be controlled by any of the parties.

Iddings v. Bruen, 4 Sandf. Ch. 417; *Moore v. Duffy*, 74 Hun, 78.

A license to manufacture or sell a patented improvement, containing no words indicating an intention that it is assignable, is purely personal, and will not pass to a receiver appointed in proceedings supplementary to execution on the property of the licensee.

Waterman v. Shipman, 55 Fed. Rep. 982, 64 Pat. Off. Gaz. 713.

A receiver took property claimed by a stranger, upon which the claimant, to relieve the property, paid a sum of money into court, to abide the further order of the court. Held, that an or-

der authorizing a suit at law, to try the right to the property, without making any provision for the disposition of the money, was irregular.

Parker v. Browning, 8 Paige, 388.

¹*Atty. Gen. v. Atlantic Mut. L. Ins. Co.* 100 N. Y. 279.

²*Tillinghast v. Champlin*, 4 R. I. 173.

³*Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 328; *Hyde v. Lynde*, 4 N. Y. 387; *Higgins v. Gillesheiner*, 26 N. J. Eq. 308.

⁴*Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46; *Gillet v. Moody*, 8 N. Y. 479; *Porter v. Williams*, 9 N. Y. 142; *Curtis v. Leavitt*, 15 N. Y. 108.

⁵Chapter on Corporations.

⁶*Wisconsin Marine & F. Ins. Co. Bank v. Manistee Salt & L. Co.* 77 Mich. 76; *Farrington v. Sexton*, 43 Mich. 454; *Lentz v. Flint & P. M. R. Co.* 53 Mich. 444; *Byles v. Kellogg*, 67 Mich. 312.

rights and powers of the person or corporation over whose property the receivership extends, measures the rights and powers of the receiver in his relation to third parties, and all causes of action, or defenses, existing in favor of the former are available to the latter.

§ 68. Subject to all liens.

A receiver appointed under the provisions of section 7, Act of 1869 (Stat. of N. Y.) "of all the assets and credits of an insolvent insurance company" is entitled to a surplus arising from a foreclosure of a real estate mortgage, and even if there is no formal conveyance of the land to the receiver.¹ And so after the sale of property under a chattel mortgage, the receiver is entitled to any surplus arising on such sale, as against the mortgagor, and also as against a judgment creditor who obtained judgment and levied on the property three days prior to the appointment of the receiver.² Where it appeared that certain funds were pledged to a person as security for liabilities incurred by him, and prior to reducing such funds to his possession the pledgor died, but subsequently the pledgee did reduce them to his possession, the court refused to order the pledgee to turn over the funds to the receiver, there appearing to be no danger of loss and the liability of the pledgee as indorser still remaining.³ And so where a note is given to a company for a particular purpose, a receiver of such company stands in no better position than the company and can treat such note only as the company could have done.⁴ And

¹*Atty. Gen. v. Atlantic Mut. L. Ins. Co.* 100 N. Y. 279.

²*Leadbetter v. Leadbetter*, 125 N. Y. 290. The principle upon which this case is based is that the mortgagor, having made default in the payment of the mortgage had no interest remaining in the property liable to the lien of an execution (*Hull v. Carnley*, 11 N. Y. 502; *Hall v. Sampson*, 85 N. Y. 274; *Galen v. Brown*, 22 N. Y. 87; *Manchester v. Tibbets*, 121 N. Y. 223), and it was determined in the lower court, in the same case, and not ap-

pealed from (32 N. Y. S. R. 890), that the mortgagor had no interest in the surplus, as against the receiver, after default in the payment of the mortgage.

³*Brady v. Furlow*, 22 Ga. 613.

⁴*Bell v. Shibley*, 33 Barb. 610, and authorities cited. The receiver of a corporation has the same right which it had to perfect title to property in its possession under a contract with the vendor that title should not pass to it until the property was paid for. *Moore v. Mercer Wire Co.* (N. J.) 15 Atl. 305.

generally the receiver takes the property of the debtor subject to all liens attaching thereto at the time of the appointment,¹ and all equitable defenses and set-offs.²

¹*Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379; *Becker v. Torrance*, 81 N. Y. 681; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059; *Davenport v. Kelly*, 42 N. Y. 198; *Gers v. Dibbs*, 17 How. Pr. 31; *VanAlstyne v. Cook*, 25 N. Y. 439.

²*Adams v. Spokane Drug Co.* 57 Fed. Rep. 889; *Bell v. Hanover Nat. Bank*, 57 Fed. Rep. 822. A receiver occupies the position of the debtor so far as the proceeds of the fund or property are concerned. *Orins v. Davis*, 68 Ga. 138.

CHAPTER VI.

SUITS BY RECEIVERS—DEFENSES TO.

- § 69. Authority of the court necessary.
Exceptions.
(a) Where decree authorizes suit.
(b) Where receivership is of partnership debts.
(c) Where debt is due the receiver officially.
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- § 70. Receiver's right to sue limited.
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- § 71. Receiver's authority must be shown.
(a) That his principal had a valid cause of action.
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- § 72. Receiver's power to sue in his own name.
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- § 73. Power of receiver to sue in foreign jurisdiction.
(a) Generally.
(b) Early English doctrine.
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- § 74. Power to sue in foreign jurisdiction as to realty.
- § 75. Power of receiver to sue in matters of fraud, trusts, etc.
- § 76. Suits against officers of corporations.
- § 77. Suits against stockholders on unpaid subscriptions.
- § 78. Suits against stockholders on statutory liability.
- § 79. Suits to invalidate liens.
- § 80. Suits on debtor's bond, replevin, distraint, etc.
- § 81. Defenses to actions brought by receivers—set-off.

§ 69. Authority of the court necessary.

The primary purpose in procuring the appointment of a receiver being the custody and preservation of the tangible property in the possession of the defendant at the date of the appointment, it has been deemed not only expedient, but an essential prerequisite that the receiver shall have the sanction and

order of the court, whose ministerial officer he is, before instituting suits concerning the property over which he is appointed, or for the collection of the assets belonging to the estate. As an officer of the court the receiver occupies a position of disinterestedness, so far as the parties are concerned, and he is also held to a strict accountability for every act that he does in his official capacity, so that ordinary prudence would suggest that he should not involve the estate in what may be expensive litigation without leave of court. Besides, as we have already seen, the discretionary powers of the receiver are exceedingly limited, and however able and competent the receiver may be, he is, with few exceptions, purely a ministerial officer, and in all cases will be slow to encroach upon the functions belonging exclusively to the court. So careful were the earlier English courts, in guarding the rights and interests of all parties, it was not deemed expedient that the receiver should make application to the court for leave to originate legal proceedings,¹ or at least without the plaintiff's concurrence.² It may be stated as a general rule, and to which there are but few exceptions originating in the increased powers of statutory receivers, that as a condition precedent to the receiver instituting any suit or proceeding he must have the consent and authority of the court either general or special.³

¹*Ireland v. Eade*, 7 Beav. 55; *Olark v. Fisher*, Sausse & S. 684; *Parker v. Dunn*, 8 Beav. 497.

²*Collaghan v. Reardon*, Sausse & S. 682.

³*Davis v. Ladoga Creamery Co.* 128 Ind. 222; *Keen v. Breckenridge*, 96 Ind. 69; *Elkhart Car Works Co. v. Ellis*, 118 Ind. 215; *Garver v. Kent*, 70 Ind. 428; *Moriarty v. Kent*, 71 Ind. 601; *Harrell v. Kent*, 71 Ind. 602; *Manlove v. Burger*, 88 Ind. 211; *Herron v. Vance*, 17 Ind. 595; *Battle v. Davis*, 66 N. C. 252. But see *Gray v. Lewis*, 94 N. C. 392 (statutory proceeding). *Davis v. Snead*, 88 Gratt. 705; *Screven v. Olark*, 48 Ga. 41; *Hill v. Western & A. R. Co.* 86 Ga. 284; *Merritt v. Merritt*, 16 Wend. 405, affirming *Re Merritt*, 5 Paige, 125; *Green v.*

Winter, 1 Johns. Ch. 60; *Wynn v. Lord Newborough*, 8 Bro. C. C. 88; *Ward v. Swift*, 6 Hare, 312; *Conyers v. Crosbie*, 6 Ir. Eq. 657; *Anon.* 6 Ves. Jr. 287; *Swaby v. Dickon*, 5 Sim. 629; *Melendy v. Barbour*, 78 Va. 544; *Reed v. Axtell*, 84 Va. 231; *Re Christian Jensen Co.* 128 N. Y. 550 (40 N. Y. S. R. 621); *Pendleton v. Russell*, 144 U. S. 640, 86 L. ed. 574; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672. But see *Tillinghast v. Champlin*, 4 R. I. 173; *Thomas v. Torrance*, 1 Chamb. Ch. (Ont.) 9; *Brien v. Paul*, 7 Tenn. Ch. 857; *King v. Cutts*, 24 Wis. 627; *Lathrop v. Knapp*, 37 Wis. 307; *Helms v. Littlejohn*, 12 La. Ann. 298; *Harland v. Banker's & M. Teleg. Co.* 32 Fed. Rep. 305; *Wayne Pike Co. v. State*, 184 Ind. 672; *Glenn v. Bussey*, 5

Under the Act of Congress of June 3, 1864, it was held that a receiver, appointed by the comptroller of the currency, and where the language of the statute provided that the receiver "may if necessary to pay the debts of such association enforce the individual liability of the stockholders," must have the consent of the

Mackey, 233 (assignee); *Martin v. Davis*, 21 Iowa, 588; *Bentley v. Shrieve*, 4 Md. Ch. 412; *Dugger v. Collins*, 69 Ala. 824.

In England it has been held that a receiver has the right to distrain for rent due without applying to the court for an order to sue, unless the right to the rent is in dispute. *Pitt v. Snowden*, 3 Atk. 750. And especially so if the tenant has attorned to the receiver. *Raincock v. Simpson*, Dick. 120, note; *Jolly v. Arbuthnot*, 4 DeG. & J. 224.

He must not only show leave of court but he must also show the equity of the party whose rights under the order of court appointing him he represents, to maintain the action which he attempts to prosecute. A receiver in general is not clothed with any right to maintain an action which the parties or the estate which he represents could not maintain. *Coops v. Bowles*, 28 How. Pr. 10.

In *Tillinghast v. Champlin*, *supra*, the court say: "According to what is understood to have been the old English practice and at all events the most convenient practice, and that generally adopted in this country he may, in order to enable him to perform his trust *suo motu*, and *without special leave* (which he must according to the present inconvenient practice in England obtain from the court appointing him) bring suits to possess himself of the estate to which he is officially entitled, incurring no risk except as to costs." This case is based upon *Green v. Bostwick*, 1 Sandf. Ch. 186; *Iddings v. Bruen*, 4 Sandf. Ch. 424,

but they do not sustain the doctrine announced.

In *Weill v. First Nat. Bank*, 106 N. C. 1, in a supplementary proceeding, the court made an order that the receiver should take charge and custody of all property, choses in action and things of value of the defendants, with all the rights, powers and privileges of a receiver under the law. The court say: "While the court may exercise very great control over the receiver and may direct, in appropriate cases, that he shall or shall not do particular things, yet, ordinarily, where he is invested with full power as receiver, he will have authority to bring appropriate necessary actions without special leave or direction of the court."

In *Everett v. State*, *McKuig*, 28 Md. 190, where an appeal was allowed from an order appointing receivers, and the appeal was not sustained, it was held that it was the duty of the receivers to institute action on the bond immediately upon the affirmance of the order appointing them, and no order directing them to do so was required.

In *Holme v. Littlejohn*, 12 La. Ann. 298, where a receiver was appointed to collect partnership assets, the order was held to be sufficient authority to bring suit against a debtor of the partnership.

Where the statute gives the receiver authority to sue, special leave is not required. *Hayes v. Brotzman*, 46 Mo. 519; *Baker v. Cooper*, 57 Me. 388; *Manlove v. Burgen*, 38 Ind. 211.

comptroller, and this must be distinctly averred, and, if put in issue, proved.¹

(a) Where by the decree it is provided that an administrator shall pay a certain sum to a receiver, and that an execution issue therefor, and that in default the receiver enforce the decree against the executor and sureties, the receiver is authorized to sue;² (b) and where the decree appoints a receiver to collect partnership debts it is sufficient;³ and where the judgment or decree does not expressly authorize the receiver to sue, he may be authorized by a subsequent order;⁴ and it seems that such order may be granted without notice.⁵ (c) No authority to sue is required where the debt is due to the receiver in his official capacity.⁶ (d) Where the receiver prosecutes his suit in the court of his appointment and with its sanction, an express order is not required to be produced;⁷ or (e) where waste is being committed.⁸ (f) Where by virtue of a statute, under the provisions of which the receiver is appointed, the receiver is authorized to sue, no leave of court is required, and none need be shown;⁹ (g) The leave is to be exercised in the sound judicial discretion of the court, or chancellor, and will not be granted where the proceedings probably would be oppressive to those interested in

¹*Kennedy v. Gibson*, 75 U. S. 498, 19 L. ed. 476; *Smith v. Manufacturer's Nat. Bank*, 9 Bank. Reg. 128; *Strong v. Southworth*, 8 Ben. 332; *Re Manufacturer's Nat. Bank*, 5 Bliss. 506; *Bly v. United States*, 4 Dill. 464; *Harvey v. Lord*, 10 Fed. Rep. 237; *Bowden v. Morris*, 1 Hughes, 380; *Welles v. Graves*, 41 Fed. Rep. 464; *Welles v. Stout*, 33 Fed. Rep. 68.

²*Elliott v. Trahern*, 35 W. Va. 634.

³*Helme v. Littlejohn*, 12 La. Ann. 298.

⁴*Lathrop v. Knapp*, 37 Wis. 307.

⁵*Hill v. Western & A. R. Co.* 86 Ga. 284.

⁶*Ex parte Harris, Re Lewis*, 45 L. J. Bkr. 71; *Armstrong v. Armstrong*, L. R. 12 Eq. 614.

⁷*Cox v. Volkert*, 86 Mo. 505.

⁸If waste is being committed and the case is pressing, a receiver may file a bill for an injunction without

waiting for an order for that purpose. *Nangle v. Fingall*, 1 Hog. 142. Waste however may be restrained by an order of court without a bill for that purpose. *Cronin v. McCarthy*, Flan. & K. 49.

⁹*Hayes v. Brotzman*, 46 Md. 519; *Wilkinson v. Rutherford*, 49 N. J. L. 241. And when the statute provides that the court may make all "needful" orders, the court may under this general power authorize the receiver to sue. *Gill v. Balis*, 72 Mo. 424.

A receiver appointed by a state court cannot defend an action in a federal court without the express authority of the court whose officer he is, so as to bind any property or effects in his hands as receiver. *Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464.

the proceedings, or where it is unlikely that advantage would be derived from the suit;' but as a rule permission to sue will be granted unless it is clear that there is no foundation for the suit;¹ and though a receiver may have power to collect a judgment it does not follow that an action thereon should be instituted by him, no sufficient reason being shown why the real parties in interest cannot sue.²

§ 70. Receiver's right to sue limited.

As a rule the power of the receiver to sue is limited to the rights of the person or corporation over whose property he is receiver, and has no power or authority beyond what such person or corporation could have exercised had the receivership not been granted, for, as we have seen, the appointment does not change the relation of the parties or increase or diminish the rights of any of them.³ To this rule there are the following exceptions: (a) Where the receiver by force of some statute is made the representative of the creditors; (b) Where the act complained of and which is sought to be avoided by the receiver is *ultra vires* and not binding on the corporation; (c) Where the receiver is appointed in a proceeding carried on by creditors, usually supplementary to execution, in which the receiver is the representative

¹ *Dacio v. John, McClell.* 575.

² *Lane v. Capsey* [1891], 8 Ch. 411. This was a proceeding against the receiver, but the principle is the same.

³ *Murrell v. McAllister*, 79 Ky. 811.

⁴ *Wallace v. Milligan*, 110 Ind. 498; *La Follett v. Aiken*, 36 Ind. 1; *Caslerly v. Witherbee*, 119 N. Y. 522; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 828. In this case, Mr. Justice Baker, speaking for the majority of the court, says: "We do not wish to be understood as saying that there is no conflict in the authorities in regard to the matter under consideration; but we think the decided weight of authority sustains the rule in respect to the powers of receivers,

where there has been no enlargement of their powers by legislative enactment, that they have such rights of action only as were possessed by the persons or corporations upon whose estate they administer." . . . "A receiver *virtute officii*, and without regard to any expansion of his powers by statute, or by an authorized decree of court, is only a custodian of property. He is ordinarily, in respect to his title and in regard to the litigations in which he may engage, merely the representative of the owners of the property submitted to his control." See *Billings v. Robinson*, 94 N. Y. 415; *Coope v. Bowles*, 42 Barb. 87.

of the creditors alone and for the securing of whose claims he is appointed.¹

¹ *Republic L. Ins. Co. v. Swigert*, 185 Ill. 150, 12 L. R. A. 328; *Hyde v. Lynde*, 4 N. Y. 887. And see *Porter v. Williams*, 9 N. Y. 142; *Curtis v. Leavitt*, 15 N. Y. 44; *Alexander v. Relfe*, 74 Mo. 495; *Farnsworth v. Wood*, 91 N. Y. 308; *Coope v. Bowles*, 42 Barb. 87; *Piscataqua F. & M. Ins. Co. v. Hill*, 60 Me. 178; *Waterhouse v. Jamieson*, 2 Pat. H. L. (Sc.) 1812; *Re Duckworth*, L. R. 2 Ch. App. Cas. 577; *Leifchild's Case*, L. R. 1 Eq. 231. In the following cases the receiver was held to represent creditors as well as the company: *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Sawyer v. Hoag*, 84 U. S. 610, 21 L. ed. 731; *Covington Drawbridge Co. v. Shepherd*, 62 U. S. 21 How. 112, 16 L. ed. 38; *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 237; *National Trust Co. v. Müller*, 33 N. J. Eq. 155; *Powers v. Hamilton Paper Co.* 60 Wis. 23; *Alexander v. Relfe*, 74 Mo. 495; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Whittlesey v. Delaney*, 73 N. Y. 571; *Dane v. Young*, 61 Me. 160; *Eyton v. Denbigh, R. & C. R. Co.* L. R. 6 Eq. 488. But most of these cases, so far as they relate to the receiver's power to sue, are based upon statutes.

A receiver of a corporation has a right to redeem from a foreclosure sale of its property in the same manner as the corporation would have had, if no receiver had been appointed. *Cassidy v. Witherbee*, 119 N. Y. 522. In supplementary proceedings see: *Porter v. Williams*, 9 N. Y. 142; *Osborne v. Moss*, 7 John. 161; *Jackson v. Garnsey*, 16 John. 184; *Jackson v. Cadwell*, 1 Cow. 622; *Leach v. Kelsey*, 7 Barb. 466; *Jewett v. Palmer*, 7 John. Ch. 65; *Padgett v. Law-*

rence, 10 Paige, 170; *De Mott v. Starkey*, 8 Barb. Ch. 408. In fraudulent or illegal acts of corporations see: *Gillett v. Moody*, 8 N. Y. 479; *Leavitt v. Palmer*, 3 N. Y. 19; *Brouwer v. Hill*, 1 Sandf. 629; *Hyde v. Lynde*, 4 N. Y. 892. In *Whittlesey v. Delaney*, 73 N. Y. 571, suit was brought by a receiver to set aside and vacate a judgment recovered against the party for whom he was appointed receiver on the ground that it was without consideration and was obtained by collusion in fraud of the rights of creditors. It was held that the action was properly brought in the name of and by the receiver as the representative, as well of creditors as the debtor. And that it was his duty in behalf of the creditors to resist the judgment and assert the rights of creditors against the fraudulent or illegal acts of the corporation by which their rights were affected. *Gillet v. Moody*, 8 N. Y. 479; *Bate v. Graham*, 11 N. Y. 237; *Talmage v. Pell*, 7 N. Y. 328; *Hackley v. Draper*, 60 N. Y. 88; *Tracy v. First Nat. Bank*, 37 N. Y. 523. He would have no standing in a court in a case to which he was not a party.

The court say in *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272: "It is the settled doctrine that the receiver of an insolvent corporation represents not only the corporation but also creditors and stockholders, and that in his character as trustee for the latter he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its agents or officers, or to recover its funds or securities invested or misapplied.

In an action supplementary to execution the receiver is not in a position as representing the debtor to impeach a completed sale of the debtor on the ground that it is fraudulent as to creditors, and as a representative of the judgment creditors he can only impeach such sale by an action instituted by him for such purpose.¹ A receiver has no right to interfere with a suit pending at the time of his appointment, without an order of court so directing him,² but the court may, on a summary application, direct the suit to be continued in the name of the receiver, or in the name of the corporation, on its giving security for costs.³

§ 71. Receiver's authority must be shown.

Inasmuch as the receiver is the representative of the person or corporation whose estate he is to administer, and, as a rule, has no powers or rights beyond his principal, it follows (a) that in order to recover he must allege and show a right of action on the part of such person or corporation,⁴ and in addition he must allege and

¹ *Brown v. Gilmore*, 16 How. Pr. 527.

² *Gadsden v. Whaley*, 14 S. C. 210; *Tracy v. First Nat. Bank*, 87 N. Y. 523.

³ *Talmage v. Pell*, 9 Paige, 410.

⁴ *Manlove v. Burger*, 88 Ind. 211; *Manlove v. Naylor*, 88 Ind. 424; *Dillings v. Robinson*, 94 N. Y. 415.

To enable the receiver of a bank to maintain in behalf of its claimants an action against the stockholders for contribution, in which losses by official mismanagement are alleged as a specific ground for enforcing such liability, it must appear from a judicial determination that there has been a loss thus occasioned in the capital stock and that the directors are unable to make good the loss. *Hewett v. Adams*, 50 Me. 271.

In order for the receiver to recover an assessment upon a premium insurance note he must show the time covered by the policy for which the note was given, and that the losses for

which the assessment was made occurred during the existence of the policy. *Embree v. Shideler*, 86 Ind. 428. In making the assessment the receiver's authority depends not upon the order of court but upon the existence of the facts rendering an assessment necessary. The promise of the assured is to pay upon certain conditions and the existence of those conditions must be shown by the party seeking to enforce the contract. *Id.*

Where there is no averment in the complaint, and therefore no foundation laid for the introduction of evidence of the liabilities of the company and there was no proof of the existence of any liabilities for the payment of which an assessment was necessary, the plaintiff cannot recover. *Id.* *Thomas v. Whallon*, 81 Barb. 172; *Savage v. Medbury*, 19 N. Y. 32. The complaint must show a right of action in the receiver. *Garver v. Kent*, 70 Ind. 428; *Manlove v. Naw*, 89 Ind. 289.

show (b) the time and mode of his appointment;¹ and (c) that he has filed the bond required by the order of appointment, where it is made a condition precedent to his taking possession that he shall give bond. Mere irregularity in giving bond will not invalidate the proceedings, however; it is only where there is no attempt to give bond, or absence of proof on that subject.² A decree of court appointing a receiver to collect partnership debts is of itself sufficient authority to authorize a suit by the receiver against a debtor of the partnership, and in such case a certified copy of the entry of appointment is all that is required.³ It must be alleged (d) that the receiver had leave of court to bring suit.⁴

¹*Dayton v. Connah*, 18 How. Pr. 826. It is not sufficient to allege "having been duly appointed receiver of," etc., and "bringing this suit by order of the supreme court;" it is not necessary, however, to set out the grounds on which the appointment was based. *Hottenstein v. Conrad*, 9 Kan. 435. See also *Gillet v. Fairchild*, 4 Denio, 80; *Bangs v. McIntosh*, 23 Barb. 596; *Hobart v. Frost*, 5 Duer, 672; *Hulbert v. Young*, 18 How. Pr. 418; *White v. Joy*, 13 N. Y. 88; *White v. Low*, 7 Barb. 204. It will not answer for a receiver merely to describe himself as receiver, or aver that he was duly appointed.

²*Heyewisch v. Silver*, 50 N. Y. S. R. 448; *Re Christian Jensen Co.* 128 N. Y. 550; *Wilson v. Welch*, 157 Mass. 77.

³*Helme v. Littlejohn*, 12 La. Ann. 298. A transcript of the proceedings is not necessary. A certified copy of the entry of appointment established *prima facie* proof that the court had the proper parties before it at the time of the appointment.

⁴*Davis v. Ladoga Creamery Co.* 128 Ind. 322; *Keen v. Breckenridge*, 96 Ind. 69, 602; *Moriarty v. Kent*, 71 Ind. 601; *Garver v. Kent*, 70 Ind. 428; *Harrell v. Kent*, 71 Ind. 602; *Herron v. Vance*, 17 Ind. 595; *Coope v. Bowles*, 28 How. Pr. 10; *Wynn v. Lord Newborough*, 8

Bro. C. C. 88; *Green v. Winter*, 1 Johns. Ch. 60; *Ward v. Swift*, 6 Hare, 812; *Re Merritt*, 5 Paige, 125; *Merritt v. Merritt*, 16 Wend. 405; *Davis v. Snead*, 33 Gratt. 705; *Screven v. Clark*, 48 Ga. 41; *Swaby v. Dickon*, 5 Sim. 629; *Battle v. Davis*, 66 N. C. 252. See as to general authority, *Rockwell v. Merwin*, 8 Abb. Pr. N. S. 880.

Where the authority of the plaintiff to sue as receiver, in his own name, is denied, it is incumbent on him to show a valid appointment, by order of the court, vesting in him the title to the choses in action of the firm whose assets he is attempting to collect; an order "that A do collect any insurance money due to the firm of B as well as all notes, accounts, and choses in action due to said firm; and also that he sell all property belonging to the firm, except the real estate, and that he keep and hold the entire proceeds from said sources until the future order of court; and by like consent it is ordered that the question of the continuance of the temporary injunction and the appointment of a receiver be continued without prejudice to the next term," does not vest in A the legal title to the assets; he is not a receiver nor a real party in interest, and cannot maintain an action in his own name. *Boyd v. Royal Ins.*

Where an action is pending at the time of the appointment of a receiver, he may continue such action in the name of the corporation which instituted the suit,¹ but he has no right to interfere in an action until he is made a party to the suit by order of court, or by an order directing him to continue in the name of the original party.

§ 72. Receiver's power to sue in his own name.

A receiver appointed by a court of chancery, in the absence of statutory power, and in the absence of an assignment by the legal owner to the receiver pursuant to the order of court, or other conveyance of the legal title to the fund or property cannot in his own name maintain a suit in another jurisdiction to recover the receivership property or debts, even when so authorized by the decree of appointment.² The power of the receiver to sue in his

Co. 111 N. C. 372; *Battle v. Davis*, 66 N. C. 252; *Gray v. Lewis*, 94 N. C. 396; *Wynne v. Heck*, 93 N. C. 414; *Abrams v. Cureton*, 74 N. C. 528.

Where a statute provided that "the receiver has, under the control of the court, power to bring and defend actions, to take and keep possession of the property," etc., and the power to appoint a receiver is given "when there is property or a fund, the right to which is involved in the action," the receiver has no right even under the order of the court to bring an action involving title to real estate against third parties, or to submit a controversy concerning title to real estate with third parties, and thus bind the real parties in interest without their consent. He can only bind the interests of such parties by joining them with him. *Caldwell v. Mo-Whorter*, 84 Ky. 180. The point does not seem to have been raised in this case, but it would seem to be an exceedingly doubtful proceeding in any case for a receiver to undertake to litigate in a court of chancery the title of third parties to real estate, in the

absence of express statutory power authorizing him so to do, and especially so where he is not in the actual possession of the property about which the title is in controversy. Except in statutory cases a court of chancery is not the proper forum to adjudicate upon legal titles.

¹*Albany City Ins. Co. v. Van Vranken*, 42 How. Pr. 281; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Tracy v. First Nat. Bank*, 37 N. Y. 523. Otherwise he is a stranger to the proceedings and has no right to be heard therein. *Re Griswold*, 13 Barb. 412; *Ketchum v. Ketchum*, 1 Abb. Pr. N. S. 157; *Isham v. Ketchum*, 46 Barb. 43; *Thacher v. Bancroft*, 15 Abb. Pr. 245.

²*Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *Hasard v. Durant*, 19 Fed. Rep. 471, *McGuin v. Frette*, 13 Ont. Rep. 699; *Stuart v. Grough*, 14 Ont. Rep. 255; *Dacie v. John*, McClel. 575; *Dickey v. McCaul*, 14 Ont. App. 166; *Alexander v. Relfe*, 9 Mo. App. 183 (reversed in 74 Mo. 495, upon the application of the statute touching the right of the receiver

own name has been recognized however (a) where the order of court so directs,¹ (b) or the statute so authorizes.² (c) But in the absence of such power he must sue in the name of the person or corporation over whose property he is appointed,³ unless he sues

to sue in his own name). *Yeager v. Wallace*, 44 Pa. 294; *Battle v. Davis*, 66 N. C. 252; *King v. Cutts*, 24 Wis. 627; *Newell v. Fisher*, 24 Miss. 342; *Manlove v. Burger*, 88 Ind. 211; *Dick v. Struthers*, 25 Fed. Rep. 103; *Kenedy v. Benson*, 54 Fed. Rep. 836; but see *contra* in *Wilkinson v. Rutherford*, 49 N. J. L. 241, where a receiver was permitted to sue on a negotiable bond when he had been appointed receiver of an insolvent savings institution. The suit was maintained on the ground that he was an assignee by legal indentment.

The Supreme Court of Massachusetts in a recent case, *Wilson v. Welch*, 187 Mass. 77, says: "Although the practice in this commonwealth has not been uniform (see *Farmers' & M. Bank v. Jenks*, 7 Met. 592; *Boot & Shoe Mfrs. Mut. F. Ins. v. Melrose Orthodox Cong. Soc.* 117 Mass. 199; *Sohier v. Lamb*, 134 Mass. 275; *Parker v. Nickerson*, 137 Mass. 487), we consider the law to be that a receiver of a corporation appointed by a court of equity cannot bring suit in his own name to recover property of the corporation which has never been in his possession unless he is authorized so to do by statute, or by the decree of a court competent to give him such authority, or unless the title to the property has been conveyed to him. Courts of equity cannot transfer the title to property by decree unless authorized by statute, although they can compel the defendant to transfer the title. Cf. *Moriarty v. Kent*, 71 Ind. 601; *Harrell v. Kent*, 71 Ind. 602; *Garver v. Kent*, 70 Ind. 428; *Justice v.*

Kirlin, 17 Ind. 588; *Harland v. Bankers' & M. Teleg. Co.* 32 Fed. Rep. 805; *Freeman v. Winchester*, 10 Smedes & M. 577; *Ingersoll v. Cooper*, 5 Blackf. 426. But see *Henning v. Raymond*, 35 Minn. 308; *Baker v. Cooper*, 57 Me. 388. *Wray v. Jamison*, 10 Humph. 186; *St. Louis & S. Coal & M. Co. v. Sandoval Coal & M. Co.* 111 Ill. 32; *Inglehart v. Bierce*, 36 Ill. 133.

¹There are cases which hold that under proper circumstances, the court appointing a receiver may authorize him to bring and prosecute suits in his own name.

Manlove v. Burger, 88 Ind. 211; *Garver v. Kent*, 70 Ind. 428; *Freeman v. Winchester*, 10 Smedes & M. 577; *King v. Cutts*, 24 Wis. 627; *Leonard v. Storrs*, 31 Ala. 488; *Hardwick v. Hook*, 8 Ga. 354.

²Or he may be authorized by statute to sue in his own name, as where the statute provides that the receiver shall "reduce the assets of such corporation to possession, and pay the debts thereof under the same rules prescribed for the government of administrators." *Manlove v. Burger*, 88 Ind. 211.

³But if the receiver is not authorized either by statute or in a proper case by the order of court from which he receives his appointment to sue in his own name he cannot do so, but must bring the action in the name of the corporation or party in whom was the right of action before the appointment of the receiver. *Yeager v. Wallace*, 44 Pa. 294; *King v. Cutts*, 24 Wis. 627; *Newell v. Fisher*, 24 Miss. 392; *Manlove v. Burger*, 88 Ind. 211.

upon a contract made with himself, or upon an obligation due to him as receiver,¹ or where a tenant has attorned to him.²

Where a court of chancery in the order of appointment confers power on the receiver to sue, he may do so on the principle that the receiver is, by operation of law, subrogated to all the rights of the real parties in interest.³

A receiver appointed "to lease or rent the premises, to take care of the same, and to collect, receive and take care of the said rents during the pendency of the action," has no right to bring an action in his own name against a tenant for unlawful detainer. *King v. Cutts*, 24 Wis. 627. But it is otherwise if the tenant holds under the receiver. *Ponder v. Catterson*, 127 Ind. 434.

A chancery receiver ordered by court to collect the notes and debts due to a partnership which the parties themselves are enjoined from collecting may sue in his own name. *Leonard v. Storrs*, 31 Ala. 488. A receiver of a partnership cannot maintain trover in his own name against a person who had converted assets of the firm before his appointment; he must sue in the name of the firm in whom was the legal right of action. *Yeager v. Wallace*, 44 Pa. 294.

At common law a receiver has no power to institute suit as such to set aside a fraudulent conveyance. *Porter v. Williams*, 9 N. Y. 142. To authorize a receiver to sue he must have the legal title to the thing in controversy. *Newell v. Fisher*, 24 Miss. 392.

¹ While the general rule is that a receiver in the absence of a statute or an order of court cannot sue in his own name this rule does not apply to a case where the receiver brings suit upon a contract made with himself as receiver, or upon an obligation due to him as receiver. *Ponder v. Catterson*, 127 Ind. 434; *Singerly v. Foz*, 75 Pa. 112.

² *Babcock v. Brooks*, 9 L. J. (U. C.) 185. Where the receiver has reduced the property to possession and it is thereafter stolen from him the title in an indictment may be alleged to be in the receiver. *State v. Rivers*, 60 Iowa, 381.

³ *Hardwick v. Hook*, 8 Ga. 354; *Wilson v. Welch*, 157 Mass. 77; *Frank v. Morrison*, 58 Md. 423; *Dorsey v. Morrison*, 48 Md. 461; *Musgrave v. Morrison*, 54 Md. 161; *Rider v. Morrison*, 54 Md. 429; *Frank v. Morrison*, 55 Md. 399; *Garver v. Kent*, 70 Ind. 428; *Moriarty v. Kent*, 71 Ind. 601; *Manclove v. Burger*, 38 Ind. 211; *Henning v. Raymond*, 35 Minn. 303; *Leonard v. Storrs*, 31 Ala. 488; *Frankle v. Jackson*, 30 Fed. Rep. 398. But see *Battle v. Davis*, 66 N. C. 252.

In a case where the legal title is in a third person, in whose name the receiver is obliged to prosecute, he must first obtain an order of court for that purpose after notice to such person. *Merritt v. Merritt*, 16 Wend. 405.

Where a defendant company after decree appointing a receiver but before the appointment is completed makes a payment alleged to be fraudulent and preferential the proceedings must be by those who are affected by the payment and not by the receiver. *Fox v. Toronto & N. R. Co.*, 29 Ch. (Ont.) 11; *Gooderham v. Toronto & N. R. Co.* 29 Ch. (Ont.) 11.

If a bill is filed by a receiver for the creditors and stockholders of a corporation it is not necessary to make the creditors and stockholders parties. *Mann v. Bruce*, 5 N. J. Eq. 418.

In most of the states by codes of procedure, or other statutory provisions, and especially in insolvency proceedings, and proceedings for winding up corporations, the receiver is specifically authorized and empowered to sue in his own name in all proceedings relating to the property over which his receivership extends.¹

§ 73. Power of receivers to sue in foreign jurisdiction.

(a) GENERALLY.

The principle involved in the question as to the power of a receiver to sue in a foreign jurisdiction, and to what extent he will be recognized and protected in such foreign jurisdiction has been the subject of very much discussion both in this country and in England for nearly two hundred years. It first originated in the discussion of the extra-territorial power of assignees in bankruptcy, and has received the consideration of the leading great jurists of both countries.² The history of the discussions upon this subject would form sufficient matter for a volume, but epitomized is as follows:

(b) EARLY ENGLISH DOCTRINE.

From about 1711, and for more than fifty years thereafter, the law of England was to the effect that no extra-territorial force was

A receiver of a firm having power to receive and reduce to his possession all the firm's assets and choses in action may maintain in his own name, without joining the firm or its members, an action on a fire policy payable to the firm. *Boyd v. Royal Ins. Co.* 111 N. C. 872; *Gray v. Lewis*, 94 N. C. 396.

¹*Alexander v. Relfe*, 74 Mo. 495; *Gill v. Balis*, 72 Mo. 424; *Stanton v. Wilkeson*, 8 Ben. 357; *Gray v. Lewis*, 94 N. C. 392; *Case v. Berwin*, 22 La. Ann. 321; *Comer v. Bray*, 83 Ala. 217; *Leavitt v. Yates*, 4 Edw. Ch. 184.

Where the statute authorizes the receiver to sue in his own name in certain enumerated cases, it does not authorize the receiver to bring suit in his own name against the sureties on the bond of his predecessor. *State*,

Fichtenkamp, v. Gambs, 68 Mo. 289.

The case of *Stanton v. Wilkeson*, *supra*, relates to the rights of a receiver of a national bank to sue the stockholders of such bank in his own name and it is held he has such power under the provisions of U. S. Rev. Stat. § 5234; it is also held that the receiver is not required to proceed in equity but may bring separate actions at law to recover the amount due from each stockholder.

²Lord Raymond, Sir Joseph Jekyl, Lord Mansfield, Lord Talbot, Lord Chancellor Camden, Lord Hardwicke, Lord Thurlow, and others in England, and Chancellor Kent, Mr. Justice Story, Chief Justice Parsons, Mr. Justice Wayne, and many others in this country.

to be given to the bankrupt laws of a foreign state, and the rights of an assignee or curator in bankruptcy to recognition in foreign courts was not recognized. Foreign assignees were not recognized in England and their local assignees were not supposed to have any rights as against creditors seeking the collection of their debts in foreign countries where some of the property of the bankrupts might be located.¹

(c) LATER ENGLISH DOCTRINE.

Commencing with 1764,² and particularly with 1788³ and 1789,⁴ the English courts modified the earlier doctrine of that country, to the extent that assignees in bankruptcy were protected in their title and possession of the bankrupt property in foreign countries, and the title and possession of foreign assignees were upheld in England. In either case, however, if by the laws of the foreign country, the title to the property became vested in a creditor through legal proceedings prior to the act of bankruptcy, then such right would be respected, but where the act of bankruptcy was previous to the completion of the judicial act instituted by the creditor, the assignees would hold. The distinction supposed to exist growing out of a vested legal title in the assignee or receiver by means of a formal conveyance and a mere possessory right, in such assignee or receiver, was never recognized in that country, his possession in either case being free from molestation or interference.⁵ The international effect to be given to transfers

¹Burge, *Colonial Law*, vol. 3, pp. 907-924 *et seq.* and cases cited.

²*Solomons v. Ross*, 1 H. Bl. 132, *note*.

³*Wright v. Nutt*, 1 H. Bl. 136.

⁴*Folliott v. Ogden*, 1 H. Bl. 123.

⁵*Hunter v. Potts*, 4 T. R. 182; *Philips v. Hunter*, 2 Tenn. 402; *Sill v. Worswick*, 1 H. Bl. 693; Burge, *Colonial Law*, vol. 3, p. 914.

The later law of England is the established law of Scotland, Ireland, Holland, Spain and France, and so far as personalty is concerned is based upon the principle that movables follow the person of their owner, and are subject to the law by which

he is governed. They are subject therefore to such disposition of them as that law makes, whether it transfers the property to the trustees or assignees, and commits to them only the possession and administration, but at the same time prevents and avoids any alienation of them which the debtor might make. It would be a strange anomaly in jurisprudence if the transfer of personalty by operation of law as in bankruptcy proceedings, insolvency proceedings, and the like, through the instrumentality of an assignee or receiver under the order and direction of the court, should not be as effective and valid, to all intents

of property by operation of law through the instrumentality of assignees and receivers, and the extra-territorial operation of the title of such officers as established in England, and other foreign countries, is based upon the broad and constantly growing system of international comity, and fosters in no little degree the spirit and beneficial results of international commerce.

(d) EARLY DOCTRINE IN UNITED STATES.

Following the line of decisions of the earlier English courts upon the subject the courts in the American colonies prior to the Revolution, and many of the state and United States courts since that period, established the doctrine that an assignee or receiver's title to personal property extended only to such property of the debtor as had a *situs* within the state of the assignee or receiver's appointment, and that beyond the state line he had no title or right of possession, or at least such as the court would enforce. As a corollary of this doctrine it was held that a foreign receiver could not sue or defend and had no standing in a court of foreign jurisdiction.¹

(e) LATER DOCTRINE IN UNITED STATES.

While some of the features of the earlier doctrine are still recognized and enforced in some of the American courts upon the principle of *stare decisis*, yet the modern doctrine as to the receiver's rights to sue in a foreign jurisdiction, and reduce to possession the assets of his principal, or recover his *choses in action* is well established by the great weight of authority as well

and purposes, the world over, as in case of succession, or voluntary transfer, when the owner's domicile governs the transfer, and where the title so conveyed is recognized and prevails wherever the property may be found.

¹*Greenwood v. Curtis*, 6 Mass. 358; *Olivier v. Townes*, 2 Mart. N. S. 98; *Burk v. McClain*, 1 Harr. & McH. 236; *Wallace v. Patterson*, 2 Harr. & McH. 463. *Milne v. Moreton*, 6 Binn. 353; *McNeil v. Colquhoun*, 2 Hayw. (N. C.) 24; *Milliken v. Aughinbaugh*, 1 Penr & W. 117; *Topham v. Chapman*, 1 Mill, Const. 288; *Robinson v.*

Crowder, 4 McCord, L. 519; *Taylor v. Geary*, Kirby (Conn.) 318; *Ingraham v. Geyer*, 13 Mass. 146; *Fox v. Adams*, 5 Me 245; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; *Hope Mut. L. Ins. Co. v. Taylor*, 2 Robt. 278; *Farmers & M. Ins. Co. v. Needles*, 52 Mo. 17; *Brigham v. Luddington*, 12 Blatchf. 237; *Hazard v. Durant*, 19 Fed. Rep. 471; *Day v. Postal Teleg. Co.* 66 Md. 354; *Booth v. Olusk*, 53 U. S. 17 How. 322, 15 L. ed. 164; *Harrison v. Sterry*, 9 U. S. 5 Cranch, 289, 8 L. ed. 104; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 359, 6 L. ed. 656.

as by reason, though there are still some limitations that will be noticed hereafter. Courts of this country have recognized the justice and cogent reasoning of the modern English courts and jurists and have sought to break away from the doctrine of the court in *Booth v. Clark*, which, though not the earliest, yet has been regarded as the leading case upon the subject, sometimes by compelling the debtor to make a formal transfer of his property to the receiver and thus vesting in him the absolute legal title by act of the parties which is recognized and enforced in all jurisdictions. Sometimes the same end has been accomplished by the establishment of a species of interstate comity, by which the judgment, and decrees of other states, and the rights and powers of receivers thereunder have been given an extra-territorial virtue and force, and the right of the receiver to sue and enforce his property rights in a foreign jurisdiction recognized and respected.

It is believed that the modern doctrine on this subject will soon become universal, and perhaps be still further extended in the same direction. It would seem that there is no occasion for recognizing a distinction between the rights of a receiver to protection from interference with his possession in whatever jurisdiction he may be, whether he has the absolute legal title to the property of the debtor, or has a mere possessory right. In either case the property is *in custodia legis*. Moreover, it would seem that where a receiver becomes vested by operation of law with the legal title, or right of possession of property or assets, that his rights therein ought to receive the same recognition and protection from all courts no matter where situated and against all persons whomsoever. Such is believed to be in accordance with the genius of our institutions, if not indeed a constitutional guarantee. The farthest our courts have gone, as will be seen by a subsequent section, is to recognize the right of the receiver to sue for and recover the receivership property in a foreign jurisdiction except as against creditors of the debtor residing in such jurisdiction. This class of creditors have been, and are now, supposed to enjoy unique privileges based solely upon local citizenship, and which are enforceable as against a receiver, wholly at variance with the law applicable to voluntary transfers. If the domicile of the owner carries with it the rights of transfer recognized by the law of his domicile no sound reason is perceived why a dis-

inction should be made between a transfer by operation of law and a voluntary transfer. If the right of possession of the owner of movable property receives the protection of all courts, foreign as well as domestic, why not award the same protection to him who succeeds to those rights by operation of law?

(f) PRESENT DOCTRINE IN UNITED STATES.

The great weight of authority in this country at the present time may be stated in general terms as follows:

(1) The receiver as a strict matter of right, by leave of court, may sue and defend in all courts of the state where he is appointed.

(2) He will be permitted to sue and defend as a foreign receiver in all courts of other states than that in which he is appointed on the principle of comity,¹ except where the rights of citizens of the

¹ *Phelps v. McCann*, 123 N. Y. 641; *Toronto Gen. Trust Co. v. Chicago, B. & Q. R. Co.* 123 N. Y. 37; *Re Waste*, 99 N. Y. 433; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Osgood v. McGuire*, 61 N. Y. 524; *Kelly v. Crapo*, 45 N. Y. 86; *Dyer v. Power*, 39 N. Y. 8. R. 136; *Pugh v. Hurl*, 52 How. Pr. 22; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Re Bristol*, 16 Abb. Pr. 184; *Peters v. Foster*, 56 Hun. 607; *Runk v. St. John*, 29 Barb. 585; *Barclay v. Quicksilver Min. Co.* 6 Lans. 25; *Hooper v. Tuckerman*, 3 Sandf. 311; *Olyphant v. Atwood*, 4 Bosw. 459; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *Falk v. Janes*, 49 N. J. Eq. 484; *Hurd v. Elizabeth*, 41 N. J. L. 1; *Bidlack v. Mason*, 26 N. J. Eq. 230; *Lewis v. Grognaud*, 17 N. J. Eq. 425; *Comstock v. Frederickson*, 51 Minn. 350; *Henning v. Raymond*, 35 Minn. 303; *Cagill v. Wooldridge*, 8 Baxt. 580; *Woodward v. Brooks*, 128 Ill. 222, 3 L. R. A. 703; *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.* 108 Ill. 317; *Iglehart v. Bierce*, 36 Ill. 133; *Cutlin v. Wilcox Silver-Plate Co.* 123 Ind. 477, 3 L. R. A. 62; *Metzner v.*

Bauer, 98 Ind. 425; *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174; *Fuller v. Stilglitz*, 27 Ohio St. 355; *Sortwell v. Jewett*, 9 Ohio, 181; *Kanaga v. Taylor*, 7 Ohio St. 134; *Chafee v. Fourth Nat. Bank*, 71 Me. 514; *Hunt v. Columbia Ins. Co.* 55 Me. 290; *Bacon v. Horne*, 123 Pa. 452, 2 L. R. A. 355; *Bagly v. Atlantic, M. & O. R. Co.* 86 Pa. 291; *Morgan v. Neville*, 74 Pa. 51; *McAlpin v. Jones*, 10 La. Ann. 552; *Paradise v. Farmers & M. Bank*, 5 La. Ann. 710; *Graydon v. Church*, 7 Mich. 36; *Winans v. Gibbs & S. Mfg. Co.* 48 Kan. 777; *Boulware v. Davis*, 90 Ala. 207, 9 L. R. A. 601; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Cooke v. Orange*, 48 Conn. 401; *Paine v. Lester*, 44 Conn. 196; *Thurston v. Rosenfeld*, 42 Mo. 474 (Assignment); *Einer v. Beste*, 32 Mo. 240 (Assignment); *Green v. Gross*, 12 Neb. 117 (Assignment); *Gilman v. Ketcham*, 84 Wis. 60, 23 L. R. A. 52; (*Contra*, *Filkins v. Nunnemacher*, 81 Wis. 91); *McClure v. Campbell*, 71 Wis. 350; *Chandler v. Siddle*, 3 Dill. 477; *Ex parte Norwood*, 3 Biss. 304.

Where the defendant was a citizen of New Jersey and the receiver prose-

cuted in behalf of a citizen of New Jersey, the suit was permitted to proceed even if a citizen of the state should be injuriously affected thereby. *Fulk v. Janes*, 49 N. J. Eq. 484.

But the rule of protecting the citizens of the state where suit is brought does not apply to a case where the receiver in the place of his appointment has reduced property in that state to his possession and takes it to a foreign state on legal business. His possession will be protected. *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.* 108 Ill. 817; *Boyle v. Townes*, 9 Leigh, 158; *Singerly v. Fox*, 75 Pa. 112; *Dick v. Bailey*, 2 La. Ann. 974; *Pond v. Cooke*, 45 Conn. 126; *Killmer v. Hobart*, 58 How. Pr. 452; *Cagill v. Wooldridge*, 8 Baxt. 580. But see *contra*, *Humphreys v. Hopkins*, 81 Cal. 551, 6 L. R. A. 792, and see note by Mr. Freeman in *Alley v. Caspari* (Me.) 6 Am. St. Rep. 185.

The protection given to a foreign receiver of a corporation was recognized and enforced in *Bidlack v. Mason*, 26 N. J. Eq. 230, where the officers of the corporation by fraud or subterfuge were endeavoring to withhold its property from the receiver, on the authority of *Runk v. St. John*, 29 Barb. 585; *Murray v. Vanderbilt*, 39 Barb. 140; *Hoyt v. Thompson*, 5 N. Y. 320; *Dayton v. Borst*, 7 Bosw. 115.

Allen, J., in *Willits v. Waite*, 25 N. Y. 577, says: "A quasi effect may be given to the law (of a foreign state) as a matter of comity, and interstate or international courtesy, when the rights of creditors or bona fide purchasers, or the interests of the state do not interfere by allowing the foreign statutory or legal transferee to sue for it in the courts of the state in which the property is," and that "the state will do justice to its own citizens so far as it can be done by administering upon property within

its jurisdiction, and will yield to comity in giving effect to foreign statutory assignments, only so far as may be done without impairing the remedies or lessening the securities which our laws have provided for our own citizens." The rules above announced have been sustained in New York in the following cases: *Petersen v. Chemical Bank*, 32 N. Y. 21; *Kelly v. Crapo*, 45 N. Y. 86; *Osgood v. McGuire*, 60 N. Y. 524; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Re Bristol*, 16 Abb. Pr. 184; *Runk v. St. John*, 29 Barb. 585; *Barclay v. Quicksilver Min. Co.* 6 Lans. 25; *Hooper v. Tuckerman*, 8 Sandf. 811; *Olyphant v. Atwood*, 8 Bosw. 459; *Re Waite*, 99 N. Y. 483; *Phelps v. Borland*, 103 N. Y. 406; *Toronto Gen. Trust Co. v. Chicago, B. & Q. R. Co.* 123 N. Y. 37; *Barth v. Backus*, 140 N. Y. 230, 23 L. R. A. 47. Many of the above cases are assignment cases in which the rights of foreign assignees were involved, but the principles are equally applicable to receivers. The law upon this subject in Indiana is stated in *Catlin v. Wilcox Silver Plate Co.* 123 Ind. 477, 8 L. R. A. 62, as follows: "The rule may be considered as established that a receiver may invoke the aid of a foreign court in obtaining possession of property or funds within its jurisdiction to which he is entitled, but aid will only be extended as against those who were parties to, or in some way in privity with the proceedings in the course of which his appointment was made, or who are in the possession of the property or fund to which the receiver has a right, and not against the creditors of a non-resident debtor who are seeking to subject the property or fund to the payment of their debts by proceedings duly instituted for that purpose." "The available legal authority of a

state of the forum are prejudiced thereby, or where it would be in contravention of the policy of such state.¹

receiver is coextensive only with the jurisdiction of the court by which he was appointed when the right of precedence or priority of creditors is asserted in respect to property or funds of a nonresident debtor which the receiver has not yet reduced to possession." Cf. *Hunt v. Columbian Ins. Co.* 55 Me. 290; *Warren v. Union Nat. Bank*, 7 Phila. 156; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201; *Farmers & M. Ins. Co. v. Needles*, 52 Mo. 17; *Taylor v. Columbian Ins. Co.* 14 Allen, 353.

¹ *Hurd v. Elizabeth*, 41 N. J. L. 1; *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 174; *Day v. Postal Teleg. Co.* 66 Md. 354; *National Trust Co. v. Miller*, 83 N. J. Eq. 155. In this case the court says: "Independent of statutory provision and simply as a matter of comity this court will extend its aid to a receiver of a foreign corporation for the purpose of enabling him to get the possession of property which should in equity be applied in payment of its debts." And where by statute a foreign corporation, doing business in a state, is made subject to the statute concerning domestic corporations, the court has the same power over such corporation in matters of insolvency, and the distribution of its assets legal and equitable, as over domestic corporations and may appoint an ancillary receiver and invest him with the same power, so far as may be necessary to the collection and recovery of its assets, as it is authorized to grant to a receiver of a domestic corporation. And this power is not dependent upon the statute, but may be exercised on the principles of a just comity. Cf.

Sobernheimer v. Wheeler, 45 N. J. Eq. 614. *Williams v. Hintermeister*, 26 Fed. Rep. 889.

Following the doctrine announced in the above case of *National Trust Co. v. Miller*, 83 N. J. Eq. 155, the Supreme Court of Massachusetts in *Buswell v. Supreme Sitting O. of I. H.* 161 Mass. 224, 23 L. R. A. 846, sustained the appointment of a foreign receiver as ancillary receiver in that state, and where it appeared that such receiver in the state of Indiana, the home of the corporation, had been, by an assignment of the corporation, invested with "all the moneys and securities of every kind belonging to the reserve fund . . . and held by each of the branches thereof," it was held that as receiver and assignee in Massachusetts, after deducting all expenses, he should transfer the remainder of the reserve and benefit funds in his possession to the receiver in Indiana, if it should appear that the decree of distribution in the latter state protected the certificate members of Massachusetts by placing them on an equality with the other members of the association. (Cf. *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 805; *Fry v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 197; *Jennings v. Philadelphia & R. R. Co.* 28 Fed. Rep. 569.) This case probably carries the doctrine of comity to the farthest extent, but the tendency of courts is in the direction of a liberal extension of the doctrine of interstate comity, and is against a narrow and provincial policy which would deny proper effect to judicial proceedings of sister states simply because they are foreign and not domestic. If it be true that the assets of an insolvent corporation

§ 74. Power to sue in foreign jurisdiction as to realty.

The right of a receiver to sue respecting real estate in a foreign state does not seem to have been discussed by our courts to any great extent. It may be stated, however, in general terms, that the mere order of appointment of a receiver in one state cannot have the effect of transferring real estate in another jurisdiction, for the reason that as to realty the law of the *situs* governs its transfer and so far as the title is concerned the decree of a foreign court could not possibly affect it; so that so far as any right of action in the receiver growing out of the decree of appointment is concerned he has none. It is different, however, where the debtor makes a transfer to the receiver in proper form, which is placed of record in the proper office of the county where the real estate is situated; but in such case the receiver's right of action is based on the assignment and not the decree of appointment.¹ It is a fundamental rule that as to real estate the *lex rei sitæ* governs not only as to the title but its enjoyment, right of mortgage, pledge, lien, and equitable ownership, and they must of necessity determine the rights of a receiver in regard thereto, except in so far as the rights of the parties may be determined in the court in which the receiver is appointed, where the parties affected are subject to the jurisdiction of such court.²

are a trust fund for the benefit of all its creditors alike, it would seem that a foreign creditor should not be permitted merely by reason of his residence, to secure a prior right to its property, or an unequal advantage over the other creditors, their contractual relations being the same. Such a policy is not based upon equitable principles, and is apparently the essence of selfishness.

As to the law regarding trustees of a foreign corporation to sue, or be substituted for the corporation, see *New Jersey Protection & L. Bank v. Thorp*, 6 Cow. 46.

As to the superintendent of the insurance department of one state appearing in another state to intervene, see *Life Assn. v. Rundle* ("Relfe v.

Rundle"), 108 U. S. 222, 26 L. ed. 337. And as to the right of assignees in insolvency or bankruptcy to sue in other jurisdictions, see *Long v. Torrest*, 150 Pa. 413, 23 L. R. A. 33, note; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538; *Reynolds v. Adden*, 136 U. S. 353, 34 L. ed. 362; *Woodward v. Brooks*, 128 Ill. 222, 3 L. R. A. 702. But see *Rhawn v. Pearce*, 110 Ill. 350; *Smith v. Chicago & N. W. R. Co.* 23 Wis. 267.

¹*Graydon v. Church*, 7 Mich. 36; *Simpkins v. Smith & P. Gold Co.* 50 How. Pr. 56; *Moseby v. Burrow*, 53 Tex. 396.

²Whart. Conf. Law, §§ 286, 287, 288, and cases cited; *Harrison v. Sterry*, 9 U. S. 5 Cranch, 289, 302, 3 L. ed. 104, 107; *Oakey v. Bennett*, 53 U. S.

§ 75. Power of receiver to sue in matters of fraud, trusts, etc.

Under the direction of the court the receiver may maintain a suit: (1) against the judgment debtor to recover property converted by him to his own use after the receiver's appointment;¹ as well as against strangers;² (2) or a bill of discovery under the New Jersey statutes;³ (3) or to remove fraudulent liens from the debtor's property;⁴ (4) or to reach assets in the hands of a mortgagee under a mortgage invalid as to creditors;⁵ (5) or to reach concealed assets or misappropriated property;⁶ (6) or for the collection of money held in trust for the benefit of the debtor;⁷ (7) or to recover interest illegally paid to a national bank;⁸ (8) or to set aside a conveyance obtained by undue influence, the grantee being insolvent;⁹ (9) or to recover securities of a corporation illegally transferred;¹⁰ (10) or to determine the validity of a mortgage lien upon the property;¹¹ (11) or to set aside a judgment unlawfully obtained against the debtor;¹² (12) or to set aside a mortgage illegally executed;¹³ (13) or to restore all property unlawfully abstracted before his appointment.¹⁴

11 How. 33, 13 L. ed. 593 (Bankruptcy); *Barnett v. Pool*, 23 Tex. 517 (Bankruptcy); *Moseby v. Burrow*, 52 Tex. 396; *Paschal v. Acklin*, 27 Tex. 173; *White v. White*, 7 Gill & J. 210; *Page v. McKee*, 3 Bush, 135; *Watts v. Waddle*, 31 U. S. 6 Pet. 400, 8 L. ed. 442.

¹*Gardner v. Smith*, 29 Barb. 68.

²*Wilson v. Allen*, 6 Barb. 542; *Gillet v. Fairchild*, 4 Denio, 82; *Brouwer v. Hill*, 1 Sandf. 629; *Porter v. Williams*, 9 N. Y. 142; *Osgood v. Ogden*, 3 Abb. App. Dec. 425.

³*Bergen v. Littell*, 41 N. J. Eq. 18.

⁴*Müller v. Mackenzie*, 29 N. J. Eq. 291.

⁵*Gallagher v. Rosenfield*, 47 Minn. 507.

⁶*South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.* 3 S. D. 205; *Gillet v. Moody*, 3 N. Y. 479.

⁷*Terhune v. Bell* (N. J.) 7 Cent. 469.

⁸*Barbour v. National Exch. Bank*, 45 Ohio St. 133; *National Bank v. Trimble*, 40 Ohio St. 629.

⁹*Mitchell v. Barnes*, 22 Hun, 194.

¹⁰*Gillet v. Moody*, 3 N. Y. 479; *Curtis v. Leavitt*, 15 N. Y. 9, 108; *Butterworth v. O'Brien*, 24 How. Pr. 438; *Gillet v. Phillips*, 13 N. Y. 114; *Whitless v. Delaney*, 73 N. Y. 571; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 275; *Vail v. Hamilton*, 85 N. Y. 453; *Tracy v. First Nat. Bank*, 37 N. Y. 523; *Crandall v. Lincoln*, 52 Conn. 73; *Osgood v. Ogden*, 4 Keyes, 70; *Porter v. Williams*, 9 N. Y. 142; *Osgood v. Laytin*, 3 Keyes, 521; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Farmers' Loan & T. Co. v. Minneapolis Engine & Mach. Works*, 35 Minn. 543; *Rudd v. Robinson*, 54 Hun, 339; *Tallmage v. Pell*, 7 N. Y. 328; *Hackley v. Draper*, 60 N. Y. 88.

¹¹*Hubbell v. Syracuse Iron Works*, 43 Hun, 182.

¹²*Stokes v. New Jersey Pottery Co.* 46 N. J. L. 237.

¹³*Vail v. Hamilton*, 85 N. Y. 453.

¹⁴*Terry v. Bamberger*, 14 Blatchf.

A receiver who has been appointed after judgment in an action for a limited divorce to receive personal property and the rents and profits of real estate may maintain an action to set aside a fraudulent conveyance where he is directed to bring such proceeding, but this case was based on the statutory ground that the receiver was authorized to sue in his own name, and also that he was a trustee of an express trust.¹ A receiver appointed in a supplementary proceeding in Wisconsin was allowed to bring a suit as receiver to set aside an alleged fraudulent conveyance, compel a conveyance to him, remove obstructions and settle adverse claims, the supplementary proceedings being based upon a judgment for alimony.²

§ 76. Suits against officers of corporations.

A court of general equity jurisdiction has power to authorize a receiver to prosecute a suit against the officers of an insolvent corporation for misconduct;³ and where a receiver of a corporation is applied for, partly by reason of the alleged insolvency of the corporation, such receiver may maintain a summary proceeding, entitled in the original action for the purpose of compelling the officers of the company to surrender assets which they are charged with concealing.⁴ In a proceeding by a receiver to recover from the corporate officers the corporation assets it is no defense that such assets are not needed for the payments of debts.⁵ The re-

284; *Gillet v. Fairchild* (trover), 4 Denio, 80.

¹*Donnelly v. West*, 24 Hun, 564; *Porter v. Williams*, 9 N. Y. 150; *Foster v. Townshend*, 2 Abb. N. C. 29.

A receiver of an insolvent corporation in New York is permitted to question the fraudulent and illegal acts of his principal, the corporation.

Porter v. Williams, 9 N. Y. 142. He represents both creditors and stockholders.

Gillet v. Moody, 3 N. Y. 479; *Leavitt v. Palmer*, 3 N. Y. 19; *Brouwer v. Hill*, 1 Sandf. 629; *Hyde v. Lynde*, 4 N. Y. 392; cf. *Bostwick v. Menck*, 40 N. Y. 883; *Underwood v. Sutcliffe*, 77

N. Y. 58; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46; *Stephens v. Perrine*, 148 N. Y. 476.

²*Barker v. Dayton*, 28 Wis. 367 (see statute); Cf. *Cook v. Cook*, 56 Wis. 195.

³*Thompson v. Greeley*, 107 Mo. 577; *Hannah v. Moberly Bank*, 67 Mo. 678; *Coz v. Volkert*, 86 Mo. 511 (he does not have statutory power in Missouri). See also *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Alexander v. Relfe*, 74 Mo. 495.

⁴*Brandt v. Allen*, 76 Iowa, 50, 1 L. R. A. 653; *Young v. Rollins*, 90 N. C. 125; *Gindrat v. Dane*, 4 Cliff. 260.

⁵*McCarty's Appeal*, 110 Pa. 379.

ceiver may avoid all acts of the officers of a corporation, even if authorized by a resolution of the board of directors where such acts are forbidden and unauthorized by law;¹ or where corporate property is placed in the hands of one of its directors to secure an indebtedness in fraud of the rights of creditors, he may avoid the transfer;² and so where a chattel mortgage was not filed as required;³ or where an officer appropriates the corporate property to his own use.⁴ Under a statute which made the officers and directors of a corporation assenting to an indebtedness in excess of the capital stock personally liable for the excess to the creditors generally, such excess becomes a trust fund distributable *pro rata* among all creditors and is recoverable in an equitable proceeding;⁵ he may hold the directors liable for acts *ultra vires*;⁶ or file a bill against state officials to quiet title;⁷ or to recover illegal dividends.⁸

§ 77. Suits against stockholders on unpaid subscriptions.

Where a statute authorizes a receiver to sue, and the court

¹*Hoyt v. Thompson*, 5 N. Y. 320; *Leavitt v. Yates*, 4 Edw. Ch. 184; and see *Market Nat. Bank v. Pacific Nat. Bank*, 102 N. Y. 464; *Talmage v. Pell*, 7 N. Y. 828; *Tracy v. Talmage*, 14 N. Y. 162.

²*Bradley v. Converse*, 4 Cliff. 375; *Bradley v. Farwell*, Holmes, 483; *Rudd v. Robinson*, 54 Hun, 339; *Southard v. Benner*, 72 N. Y. 424; *Underwood v. Sutcliffe*, 77 N. Y. 58; *Haywood v. Lincoln Lumber Co.* 74 Wis. 639; *Nathan v. Whitlock*, 9 Paige, 152; *Robinson v. Bank of Attica*, 21 N. Y. 406; *Atkinson v. Rochester Printing Co.* 114 N. Y. 168.

³*Stephens v. Perrins*, 143 N. Y. 476. In all such cases of supplementary proceedings the receiver has a right to prosecute all actions to set aside transfers of property made to defraud creditors. *Mandeville v. Avery*, 124 N. Y. 376; *Becker v. Torrance*, 31 N. Y. 631; *Bostwick v. Menck*, 40 N. Y. 383; *Wright v. Nostrand*, 94 N. Y. 31 (see N. Y. Code Civ. Proc.).

⁴*Brandt v. Allen*, 76 Iowa, 50, 1 L. R. A. 653; *Gillet v. Moody*, 3 N. Y. 479; *Gillet v. Phillips*, 13 N. Y. 114; *Hayes v. Kenyon*, 7 R. I. 136; *United States v. Church of Jesus Christ of L. D. S.* 5 Utah, 361; *Holden v. Upton*, 184 Mass. 177; *Osgood v. Laytin*, 8 Abb. App. Dec. 418. But see *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 328.

⁵*Low v. Buchanan*, 94 Ill. 76.

⁶*Austin v. Daniels*, 4 Denio, 299; *Thompson v. Greely*, 107 Mo. 577; *Gray v. Davis*, 1 Woods, 420, affirmed in 33 U. S. 16 Wall. 208, 21 L. ed. 447.

⁷*Minnesota Thrasher Mfg. Co. v. Langdon*, 44 Minn. 37.

⁸The appointment of a receiver does not preclude the corporation from suing to try the legal title to property, (*St. Louis & S. Coal & M. Co. v. Sandoval Coal & M. Co.* 111 Ill. 32) unless the court has forbidden it. *Id.*

directs him to do so, a receiver may maintain an equitable proceeding in behalf of all the creditors of an insolvent corporation for an accounting, and to compel its stockholders to contribute unpaid subscriptions to the payment of its debts, and such suit may be brought by the receiver in his own name although neither the statute nor the order in terms directs the suit to be brought.¹ In such a proceeding it is not competent for a defendant stockholder to set up as a defense fraud in procuring the appointment of the receiver, or that the corporation is not indebted. These matters are adjudicated in the action resulting in the appointment of the receiver.² A proceeding of this nature may be maintained by a receiver against stockholders and creditors for the purpose of obtaining an accounting of the amounts due the creditors, and to ascertain the individual liability of the stockholders, and compel payment thereof for the purpose of meeting the creditors' demands, and in the meantime may restrain the individual creditors from prosecuting separate suits on the individual liability of the creditors. All equities may be settled and adjusted in one action.³ When a dividend has been declared and received by stockholders the effect of which has been to impair the capital of the company, the receiver may maintain an action against the stockholders and creditors to recover from the stockholders such dividend, when it appears that some of the creditors are prosecuting suits against the stockholders to secure such illegal dividends, and when such funds so misappropriated are necessary to pay the debts of the corporation.⁴

¹ *Mathis v. Pridham*, 1 Tex. Civ. App. 58; *Dayton v. Borst*, 31 N. Y. 485; *Frank v. Morrison*, 58 Md. 423; *Stillman v. Dougherty*, 44 Md. 380.

² *Schoonover v. Hickley*, 48 Iowa, 82.

³ *Calkins v. Atkinson*, 2 Laus. 12; *Whittlesey v. Frantz*, 74 N. Y. 456; *Stark v. Burke*, 5 La. Ann. 740; *New Orleans Gaslight Co. v. Bennett*, 6 La. Ann. 456; *Clarke v. Thomas*, 34 Ohio St. 46.

⁴ *Osgood v. Laytin*, 48 Barb. 463. The provisions of the New York statute authorizing receivers of an insolvent corporation to sue for and re-

cover unpaid stock subscriptions was held to be a cumulative remedy merely, in *Mann v. Ourrie*, 2 Barb. 294. In a suit by a receiver of an insolvent bank to recover moneys of the bank received by one of its creditors subsequent to his appointment, the proceeding is by bill, and not by a petition; because the receiver is an officer of court he has no more privileges than any other suitor. *State Bank v. First Nat. Bank*, 34 N. J. Eq. 450.

A stockholder liable on his subscription as called for by the directors may in equity be compelled to pay to

It may be stated as a general rule that a receiver is authorized and it is his duty to collect the unpaid subscriptions so far as such collection may be essential to the payment of the debts.¹ But he has no authority to call upon a subscriber for his unpaid balance until the amount of the unpaid balance has been determined by the court and thus the *pro rata* liability of each share fixed.²

Where corporations have attempted to distribute their stock among their stockholders leaving corporation debts unpaid, the creditors, by proper suits, may compel the stockholders to refund sufficient amount to pay these debts.³ And upon the same principle when stock has not been all paid in the delinquent stockholders may be compelled to contribute sufficient to pay such debts, and where the statute is silent as to the method to be pursued in enforcing such liability, a court of equity is the proper

the receiver representing the creditors, even in the absence of action by the directors, requiring payment. *Sagory v. Dubois*, 8 Sandf. Ch. 466; *Upton v. Hansbrough*, 8 Biss. 417. But an assessment or its equivalent is essential to the liability of the shareholder. *Chandler v. Siddle*, 3 Dill. 477. And the stockholder must have been a party to the proceeding in which the receiver was appointed to be held liable in Illinois. *Chandler v. Brown*, 77 Ill. 333; *Rowell v. Chandler*, 88 Ill. 288; *Chandler v. Dore*, 84 Ill. 275; *Chesnut v. Pennell*, 93 Ill. 55; *Lamar Ins. Co. v. Gulick*, 102 Ill. 41 (see Statute of 1872, § 25). But see *contra*, *Great Western Teleg. Co. v. Gray*, 122 Ill. 630.

In *Wincock v. Turpin*, 96 Ill. 135, it is held that where a liability is created by statute the remedy is at law, and a proceeding in equity will not be entertained unless authorized by statute; but if the statute makes the liability joint, then equity would be the proper forum. Cf. *Culver v. Third Nat. Bank*, 64 Ill. 528; *Corwith v.*

Culver, 69 Ill. 502; *Tiddalls v. Libby*, 87 Ill. 142; *Arenz v. Weir*, 89 Ill. 25; *McCarthy v. Lavasche*, 89 Ill. 270; *Fuller v. Ledden*, 87 Ill. 310. But see *Low v. Buchanan*, 94 Ill. 76.

¹*Dayton v. Borst*, 31 N. Y. 435; *Nathan v. Whitlock*, 9 Paige, 152; *Dorris v. French*, 4 Hun, 292; *Van Wageningen v. Clark*, 22 Hun, 497; *Calkins v. Atkinson*, 2 Lans. 12; *Tucker v. Gilman*, 45 Hun, 193; *Rankine v. Elliott*, 16 N. Y. 377; *Frank v. Morrison*, 58 Md. 423; *Hall v. United States Ins. Co.* 5 Gill, 484; *Chandler v. Brown*, 77 Ill. 333; *Means' Appeal*, 85 Pa. 75.

²*Chandler v. Keith*, 42 Iowa, 99; *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294.

³*Vose v. Grant*, 15 Mass. 505; *Spear v. Grant*, 16 Mass. 9; *Wood v. Dummer*, 3 Mason, 308; *Nathan v. Whitlock*, 9 Paige, 152. In Minnesota, by statute the right to sue in such case passes to the receiver, as the representative of all the creditors. *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 87.

forum.¹ But in this proceeding, in the absence of authority to the receiver, except such as belongs to ordinary receivers, and in the absence of statutory power, the creditor and not the receiver is the proper person to sue.² An order of court directing a sale of all the assets, property and business of an insolvent corporation, must be construed as applicable only to the sale of such property as belonged to the corporation, or such causes of action as it might have enforced in its own right, and not causes of action which the receiver might have maintained in the right of creditors, such as the recovery of capital withdrawn and refunded to the shareholders, leaving debts unpaid.³

Where a receiver is appointed to take charge of the property and assets of an insolvent corporation, he cannot maintain an action against the stockholders to enforce an alleged liability which could not have been enforced by the corporation itself.⁴ Under the U. S. Rev. Stat., § 563, sub. 4, the action authorized is a suit at common law by a receiver to enforce a stock liability within the jurisdiction of the federal courts.⁵ Suits of this nature are usually authorized by statute.⁶

¹*Mann v. Pentz*, 8 N. Y. 415, and cases cited in last note above.

²*Mann v. Pentz*, 8 N. Y. 415, overruling same case in 2 Sandf. Ch. 257; *Stringer's Case*, L. R. 4 Ch. App. 475; *Rance's Case*, L. R. 6 Ch. 104; *Re National Funds Assur. Soc.* L. R. 10 Ch. Div. 118; *Re Alexandra Palace Co.* L. R. 21 Ch. Div. 149.

³*Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37.

⁴*Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 328.

⁵*Stephens v. Bernays*, 41 Fed. Rep. 401. The section referred to giving jurisdiction to district courts in matters of national banks is not taken away by act of Congress of July 12, 1882, § 4, and of Aug. 13, 1888, § 4.

⁶Illinois: *Great Western Teleg. Co. v. Gray*, 122 Ill. 630; *Woolverton v. George H. Taylor Co.* 43 Ill. App. 424.

Iowa: *Stewart v. Lay*, 45 Iowa, 604.

Louisiana: *Gaslight & Bkg. Co. v. Haynes*, 7 La. Ann. 114; *New Orleans Gaslight Co. v. Bennett*, 6 La. Ann. 457; *Stark v. Burke*, 5 La. Ann. 740.

Maryland: *Frank v. Morrison*, 58 Md. 423; *Stillman v. Dougherty*, 44 Md. 380.

Minnesota: *Merchants' Nat. Bank v. Northwestern Mfg. & Car. Co.* 48 Minn. 361 (Liability); *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37.

New York: *Calkins v. Atkinson*, 2 Lans. 12; *Rankins v. Elliott*, 16 N. Y. 377; *Pentz v. Hawley*, 1 Barb. Ch. 123; *Van Wagenen v. Clark*, 22 Hun, 497. But a receiver under a creditor's bill cannot sue for such subscriptions. *Mann v. Pentz*, 8 N. Y. 415. And see *Billings v. Robinson*, 28 Hun, 122; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Dayton v.*

Defenses to this class of actions instituted by a receiver in a statutory proceeding are not, as a rule, available. Thus, it is no defense that the entire stock had not been subscribed;¹ nor is error in the appointment;² nor fraudulent acts of the officers of the corporation;³ nor the fraudulent character of the corporation, or misrepresentation in procuring the subscription;⁴ nor fraud in procuring the appointment of the receiver;⁵ nor that the incorporation is not indebted;⁶ or that its assets have not been collected;⁷ nor that fraudulent claims have been allowed.⁸ But the shareholder is not liable to the receiver if he was not liable to the corporation;⁹ nor can the receiver collect subscriptions in a foreclosure case if the bonds are invalid.¹⁰

§ 78. Suits against stockholders on statutory liability.

In general the statutory liability of stockholders is a liability to the creditors of the corporation and a receiver of an insolvent corporation in the absence of statutory power has no authority to enforce such liability, and this inability is based upon the fact that such liability is not a corporate asset and does not go to the receiver as such.¹¹ Upon the same principle the receiver has no

Borst, 81 N. Y. 435; *Tracy v. First Nat. Bank*, 37 N. Y. 523; *Weeks v. Love*, 50 N. Y. 571; *Osgood v. Laytin*, 5 Abb. Pr. N. S. 1; *Briggs v. Penniman*, 8 Cow. 387; *Mills v. Stewart*, 41 N. Y. 384; *Morgan v. New York & A. R. Co.* 10 Paige, 290.

Ohio: *Clarke v. Thomas*, 34 Ohio St. 46; *Jewett v. Valley R. Co.* 34 Ohio St. 601.

Rhode Island: *Tobey v. Russell*, 9 R. I. 58; *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376.

Washington: *Elderkin v. Peterson*, 8 Wash. 674.

¹ *Stillman v. Dougherty*, 44 Md. 330; *Ruggles v. Brock*, 6 Hun, 164.

² *Stewart v. Lay*, 45 Iowa, 604.

³ *Stewart v. Lay*, 45 Iowa, 604; *Ruggles v. Brock*, 6 Hun, 164.

⁴ *Litchfield Bank v. Church*, 29 Conn. 187; *Schoonover v. Hinckley*, 48 Iowa, 82.

⁵ *Schoonover v. Hinckley*, 48 Iowa, 82; *Stewart v. Lay*, 45 Iowa, 604.

⁶ *Schoonover v. Hinckley*, 48 Iowa, 82.

⁷ *Stark v. Burke*, 9 La. Ann. 341. But see *Chandler v. Keith*, 42 Iowa, 99; *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294.

⁸ *Foots v. Glenn*, 53 Fed. Rep. 529.

⁹ *Billings v. Robinson*, 94 N. Y. 415; *Winters v. Armstrong*, 37 Fed. Rep. 508.

¹⁰ *Farmers' Loan & T. Co. v. San Diego Street Car Co.* 49 Fed. Rep. 188.

¹¹ *Arens v. Weir*, 89 Ill. 25 (statutory); *Butler v. Walker*, 80 Ill. 345; *Liberty Female College Assn. v. Watkins*, 70 Mo. 18; *Billings v. Robinson*, 94 N. Y. 415; *Cutting v. Damerel*, 88 N. Y. 410; *Cuykendall v. Corning*, 88 N. Y. 129; *Jacobson v. Allen*, 20 Blatchf. 525; *Lane v. Morris*, 8 Ga. 468; *Davis v. Gray*, 88 U. S. 16 Wall. 203, 21 L. ed. 447; *Wright v. McCor-*

right to enforce the individual liability of a partner to the firm in behalf of the firm creditors,¹ or his assignee.

§ 79. Suits to invalidate liens.

In the absence of special statutory powers, and in the absence of a conveyance to him from the mortgagee, a receiver cannot maintain a suit to determine the validity of liens of parties in, and parties out of possession, as against the lien of a mortgage in the foreclosure of which he is appointed, where neither the mortgagee nor mortgagor is a party. If complainant claims the legal title to real estate he cannot, in a court of equity, sustain an action against persons in possession claiming adversely;² nor can he

mack, 17 Ohio St. 86; *Farnsworth v. Wood*, 91 N. Y. 308. Cf. *Chemical Nat. Bank v. Colwell*, 182 N. Y. 250; *Story v. Furman*, 25 N. Y. 214.

¹*Wallace v. Milligan*, 110 Ind. 498.

The court in *Wincock v. Turpin*, 96 Ill. 185, says: "It may be a state of facts might exist which would authorize a court of equity to bring before it all the stockholders and depositors and determine their rights and adjust equities, marshal the fund and distribute it *pro rata*, but no such case is made by this bill; and until such a case shall be made we must leave the depositors to pursue their remedies under the law. We have held in a number of cases that as the right is given by statute the remedy is at law. *Culver v. Third Nat. Bank*, 64 Ill. 528; *Corwith v. Culver*, 69 Ill. 502; *Tibballs v. Libby*, 87 Ill. 142; *Arens v. Weir*, 89 Ill. 25; *McCarthy v. Lavasche*, 89 Ill. 270; *Fuller v. Ladden*, 87 Ill. 310.

The authorities upon this subject in other jurisdictions are not uniform. If the liability was joint then equity would be the proper forum, as was held in *Elmes v. Davis*, 102 Ill. 350. Where the liability creates a common fund for the benefit of all creditors entitled to share in it, and the secur-

ing of a ratable distribution of it among all such creditors, it is a proper case for equitable jurisdiction. *Merchants' Bank v. Stevenson*, 5 Allen, 401; *Crease v. Babcock*, 10 Met. 532; *Briggs v. Penniman*, 8 Cow. 387; *Honor v. Henning*, 98 U. S. 228, 23 L. ed. 879.

Low v. Buchanan, 94 Ill. 81; *Harper v. Union Mfg. Co.* 100 Ill. 225. And equitable jurisdiction may also be maintained on the ground of avoiding a multiplicity of suits.

Some courts have given creditors in case of a personal statutory liability of stockholders a concurrent remedy by suit at law or suit in equity for the enforcement of the liability. *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 478; *Van Hook v. Whitlock*, 8 Paige, 409; *Norris v. Johnson*, 34 Md. 485; *Perry v. Turner*, 55 Mo. 418; *Adkin v. Thornton*, 19 Ga. 325; *Robinson v. National Bank*, 95 N. Y. 637.

²*Harland v. Bankers' & M. Teleg. Co.* 32 Fed. Rep. 305; *Frost v. Spilley*, 121 U. S. 556, 30 L. ed. 1012; *Alexander v. Pendleton*, 12 U. S. 8 Cranch, 462, 3 L. ed. 624; *Peirce v. Elliott*, 31 U. S. 6 Pet. 95, 8 L. ed. 332; *Orton v. Smith*, 59 U. S. 18 How. 263, 15 L. ed. 393; *Crews v. Burcham*, 66 U. S. 1 Black, 352, 17 L. ed. 91; *Ward v.*

maintain a bill for an accounting for damages suffered by the mortgagor, growing out of a breach of contract made with him, where it is claimed that the mortgage covered the property embraced in such contract.¹ But a receiver appointed under the provisions of the New York Code of Civil Procedure was ordered to commence a proceeding to determine what bonds issued by the company were secured by the mortgage, and what bonds, if any, were to be excluded from participation in the proceeds, and also to determine the ownership of such bonds, and the validity of others, it was held that the receiver's action was sustainable as a proceeding in equity.² Where the receiver desires to test the validity of a levy upon the receivership property, his proper course is to bring an independent action to set aside the levy, and not by motion for a rule on the sheriff to show cause. The reason of this rule is based upon the fact that neither the receiver, the creditor, nor the sheriff, was a party to the proceeding in which the receiver was appointed.³

§ 80. Suit on debtor's bond, replevin, distraint, etc.

The receiver of an insolvent debtor has no right of action on an official bond of the debtor and his sureties, the general rule being, as we have seen, that a receiver has no right of action other than is vested in the debtor himself, except where he sues as the representative of creditors.⁴ Nor has he a right to maintain a suit in replevin for personal property mortgaged by the judgment debtor, and reduced to possession by the mortgagee before the commencement of the proceedings in which the receiver is appointed.⁵ His right to distrain has been recognized, and he may appoint a bailiff for that purpose,⁶ but he cannot distrain and attach at the same time.⁷

An action cannot be sustained by a receiver against an assignee

Chamberlain, 87 U. S. 2 Black, 430, 17 L. ed. 319; *United States v. Wilson*, 118 U. S. 86, 30 L. ed. 110; *Fussell v. Gregg*, 113 U. S. 550, 28 L. ed. 993.

¹*Harland v. Bankers' & M. Teleg. Co.* 32 Fed. Rep. 305.

²*Hulbell v. Syracuse Iron Works*, 42 Hun, 182.

³*Andrews v. Paschen*, 67 Wis. 418.

And see *Gelpeke v. Milwaukee & H. R. Co.* 11 Wis. 454.

⁴*State, Shepard, v. Sullivan*, 120 Ind. 197; *Coffin v. Ransdell*, 110 Ind. 417; *Wallace v. Milligan*, 110 Ind. 498.

⁵*Campbell v. Fish*, 8 Daly, 162.

⁶*Birch v. Oldis, Sauss. & S.* 146.

⁷*Eyre v. Eyre*, 1 Hog. 252.

of the judgment debtor under an assignment for the benefit of creditors to recover damages resulting to the judgment debtor from failure of the assignee to properly discharge his duty as such assignee.¹

§ 81. Defenses to actions brought by receivers — set-off.

The general rule, in all actions brought by a receiver is that the defendant may interpose such defenses as might have been available to him had suit been instituted by the person or corporation for whose estate the receiver is appointed.² Thus in an action by the receiver the defendant may interpose a counterclaim or set-off,³ provided the right of set-off accrued before the receiver's appointment,⁴ and the respective rights of action are of the same nature,⁵ and the receiver sues as the representative of the debtor and not creditors,⁶ and where the claim of defendant is free from fraud,⁷ and if the demands are liquidated.⁸ The debts

¹*La Follett v. Akin*, 36 Ind. 1.

²*Coz v. Volkert*, 86 Mo. 505; *Colt v. Brown*, 12 Gray, 238; *Brooks v. Bigelow*, 142 Mass. 6; *Moise v. Chapman*, 24 Ga. 249; *Litchfield Bank v. Peck*, 29 Conn. 384; *Clarke v. Hawkins*, 5 R. I. 219; *Van Wagoner v. Paterson Gaslight Co.* 23 N. J. L. 283; *Chase v. Petroleum Bank*, 66 Pa. 169; *Hyde v. Lynde*, 4 N. Y. 387; *Thomas v. Whalton*, 81 Barb. 172; *Williams v. Babcock*, 25 Barb. 109; *Devendorf v. Beardsley*, 23 Barb. 656; *Berry v. Brett*, 6 Bosw. 627; *Clark v. Brockway*, 8 Keyes, 13.

³*Armstrong v. Warner*, 49 Ohio St. 376, 17 L. R. A. 466; *Hade v. McVay*, 81 Ohio St. 281; *Lindsay v. Jackson*, 2 Paige, 581; *Com. v. Shoe & L. Dealers' F. Ins. Co.* 112 Mass. 181; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059; *Holbrook v. American F. Ins. Co.* 6 Paige, 220; *Colt v. Brown*, 12 Gray, 238; *Re Van Allen*, 87 Barb. 225; *State Bank v. Bank of New Brunswick*, 3 N. J. Eq. 266; *Re Middle District Bank*, 1 Paige, 585; *Cook v. Cole*, 55 Iowa, 70; *Berry v. Brett*, 6 Bosw. 627; *Davis v. Stover*, 58 N. Y. 473; *Com. v. Phoenix Bank*, 11 Met.

129; *Scammon v. Kimball*, 92 U. S. 362, 28 L. ed. 483.

As to the rule in mutual insurance companies see *Lawrence v. Nelson*, 21 N. Y. 158; *Hillier v. Allegheny County Mut. Ins. Co.* 3 Pa. 470. But see *Berry v. Brett*, 6 Bosw. 627; *Vanatta v. New Jersey Mut. L. Ins. Co.* 31 N. J. Eq. 15. And savings banks see *Osborn v. Byrne*, 43 Conn. 155; *Stockton v. Mechanics' & L. Sav. Bank*, 82 N. J. Eq. 163.

⁴*Smith v. Mosby*, 9 Helsk. 501; *Lanier v. Gayoso Sav. Inst.* 9 Helsk. 506; *United States Trust Co. v. Harris*, 2 Bosw. 75; *Cook v. Cole*, 55 Iowa, 70; *Smith v. Felton*, 43 N. Y. 419; *Bradley v. Angel*, 3 N. Y. 475; *Smith v. Fox*, 48 N. Y. 674; *Newcomb v. Almy*, 96 N. Y. 308; *Van Dyck v. McQuade*, 85 N. Y. 616; *Jordan v. Sharlock*, 84 Pa. 366.

⁵*Williams v. Traphagen*, 38 N. J. Eq. 57; *Singerly v. Fox*, 75 Pa. 112.

⁶*Osgood v. Ogden*, 4 Keyes, 70; *Clark v. Brockway*, 8 Keyes, 13; *Osgood v. Maguire*, 61 N. Y. 524.

⁷*Gillet v. Phillips*, 18 N. Y. 114.

⁸*Olyphant v. St. Louis Ore. & S. Co.* 39 Fed. Rep. 308.

must, however, be due to and from the same persons, at least equitably.¹

The defendant in an action by a receiver is entitled to a set-off of any debts due to him by the insolvent, at the time of the stopping payment by the insolvent, and the appointment of a receiver as a rule does not change the relationship of the parties.² The receiver will not be permitted to allow as a partial accord and satisfaction an uncompleted agreement of an insolvent made prior to his suspension,³ and the receiver has no right to set up as a defense to the claim of a judgment creditor, matters which might have been pleadable in behalf of the corporation against the recovery of a judgment.⁴ In a suit brought by a receiver it is no defense that he has not filed a bond, where the decree of appointment does not make the giving of such bond a condition to his appointment,⁵ nor can the validity of the appointment of the receiver be questioned.⁶ The sufficiency of the allegations in regard to the time and place, and court in which the receiver was appointed cannot be raised on a motion in arrest of judgment.⁷

¹*Re Van Allen*, 37 Barb. 225; *Newcomb v. Almy*, 96 N. Y. 308; *Dale v. Cooke*, 4 Johns. Ch. 11; *Barber v. Spencer*, 11 Paige, 517; *Mollan v. Griffith*, 8 Paige, 402.

²In *Re Middle District Bank*, 1 Paige, 585, it was held the debt may fall due after the act of insolvency and be a proper matter of set-off. See also *Van Wagoner v. Paterson Gaslight Co.* 23 N. J. L. 283. The general rule is that in a suit by the receiver the defendant has a right to all defenses, or

set-offs existing between the original parties. *Cox v. Volkert*, 86 Mo. 505.

³*Clarke v. Hawkins*, 5 R. I. 219.

⁴*State v. Clinton & P. H. R. Co.* 21 La. Ann. 156; it is *res judicata* as to him.

⁵*Wilson v. Welch*, 157 Mass. 77.

⁶*Comer v. Bray*, 88 Ala. 217.

⁷*Grissel v. Schmal*, 55 Ind. 475; *Spahr v. Nicklaus*, 54 Ind. 221; *Toledo, W. & W. R. Co. v. Milligan*, 52 Ind. 505; *Harris v. Rivers*, 53 Ind. 216.

CHAPTER VII.

SUITS AGAINST THE RECEIVER.

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§ 82. Generally.

As we have already seen, the court appointing a receiver will not permit him to sue or engage in litigation unless authorized so to do by the court to which he owes his appointment, and not then unless his right appears clear, and favorable results are most probable, or the statute expressly empowers him to sue. The purpose of this rule is to secure an economical administration of the estate, a speedy winding up of the litigation, and a fair and equitable adjustment of the rights of all parties in interest. Where all conflicting interests can be drawn to the same jurisdiction, a much more comprehensive and intelligent adjudication can be had and entire justice to all parties can be secured thereby. Much stronger reasons exist in regard to suits against a receiver, or the property in his charge, or any interference with or molestation of his administration of the estate, as to the control which the court will exercise over litigation affecting the receivership property. Courts are jealous, and rightfully so, in regard to their possession through the receiver, of the funds or property which they are called upon to administer and distribute, or adjudicate and determine the rights of parties thereto. It would not

be conducive to justice or good government, or in harmony with the fundamental principles of equity jurisprudence if the possession of a court of competent jurisdiction could be harrassed and interfered with at the whim or will of litigants, in their unseemly scrambles for advantage.

§ 83. Order of court necessary.

Unless expressly authorized by statute a suit cannot be brought against a receiver without the permission of the court which appointed him.¹ The court in granting leave to sue must be satis-

¹*Moran v. Sturges*, 154 U. S. 275, 38 L. ed. 987; *Re Swan*, 150 U. S. 648, 37 L. ed. 1209; *Porter v. Sabín*, 149 U. S. 478, 37 L. ed. 815; *Ex parte Tyler*, 149 U. S. 181, 37 L. ed. 694; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 286, 34 L. ed. 346; *Thompson v. Phenix Ins. Co.* 136 U. S. 297, 34 L. ed. 413; *Savannah v. Jesup*, 106 U. S. 565, 27 L. ed. 276; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Southern Exp. Co. v. Western N. C. R. Co.* 99 U. S. 191, 25 L. ed. 319; *Davis v. Gray*, 83 U. S. 16 Wall. 208, 21 L. ed. 447; *Wiswall v. Sampson*, 55 U. S. 14 Wall. 52, 14 L. ed. 822; *Avery v. Boston Safe Deposit & T. Co.* 72 Fed. Rep. 700; *Werner v. Murphy*, 60 Fed. Rep. 772; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. Rep. 528, 528; *The St. Nicholas*, 49 Fed. Rep. 676; *Missouri P. R. Co. v. Texas P. R. Co.* 41 Fed. Rep. 311; *Olyphant v. St. Louis, Ore. & S. Co.* 28 Fed. Rep. 729; *Palmer v. Scriven*, 21 Fed. Rep. 354; *Kennedy v. Indianapolis C. & L. R. Co.* 3 Fed. Rep. 99; *Jordan v. Wells*, 3 Woods, 527; *Young v. Montgomery & E. R. Co.* 3 Woods, 619; *Thompson v. Scott*, 4 Dill. 508; *Barton v. Barbour*, 3 McArthur. 219; *Farmers' Loan & T. Co. v. Central R. Co.* 3 McCrary. 181; *Andrews v. Smith*, 19 Blatchf. 108;

Perego v. Bonesteel, 5 Biss. 69; *Blake v. Alabama & C. R. Co.* 6 Nat. Bankr. Reg. 332; *Talladega Mercantile Co. v. Jenifer Iron Co.* 102 Ala. 259; *Ex parte Printup*, 87 Ala. 148; *Carlin v. Jones*, 55 Ala. 624; *Pacific R. Co. v. Wade*, 91 Cal. 449, 18 L. R. A. 754; *Phelan v. Ganebin*, 5 Colo. 14; *DeGraffenried v. Brunswick & A. R. Co.* 57 Ga. 22; *Henderson v. Walker*, 55 Ga. 481; *Martin v. Atchison*, 2 Idaho, 590; *Mulcahey v. Strauss*, 151 Ill. 70; *Smith v. United States Exp. Co.* 135 Ill. 279; *Wyatt v. Ohio & M. R. Co.* 10 Ill. App. 289; *Andrews v. Stanton*, 18 Ill. App. 163; *Wayne Pike Co. v. State*, 134 Ind. 672; *Davis v. Ladoga Creamery Co.* 128 Ind. 222; *Elkhart Car Works Co. v. Ellis*, 118 Ind. 215; *Keen v. Breckenridge*, 96 Ind. 69; *Fort Wayne, M. & O. R. Co. v. Mellett*, 92 Ind. 588; *Moriarty v. Kent*, 71 Ind. 601; *Garver v. Kent*, 70 Ind. 428; *Herron v. Vance*, 17 Ind. 595; *Allen v. Central R. Co.* 42 Iowa, 683; *Conwell v. Lowrance*, 46 Kan. 88; *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414; *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225; *Spalding v. Com.* 88 Ky. 188; *Hazelrigg v. Bronaugh*, 78 Ky. 62; *Porter v. Kingman*, 126 Mass. 141; *Day v. Postal Teleg. Co.* 66 Md. 369; *Citizens Sav. Bank v. Person*, 98 Mich. 178; *Kenney v. Ranney*, 96 Mich. 617; *People, Tremper, v. Brooks*, 40 Mich. 338; *Harding v. Nettleton*, 86 Mo. 658;

Heath v. Missouri, K. O. & T. R. Co. 88 Mo. 617; *Palys v. Jewett*, 82 N. J. Eq. 802; *Little v. Dusenberry*, 46 N. J. L. 614; *Re Christian Jensen Co.* 128 N. Y. 550; *Walling v. Miller*, 108 N. Y. 177; *Rogers v. Wheeler*, 48 N. Y. 604; *Chautauque County Bank v. Risley*, 19 N. Y. 869; *James v. James Cement Co.* 8 N. Y. S. R. 490; *Read v. Brayton*, 72 Hun, 638; *Preston v. Loughran*, 58 Hun, 210; *Re Loos*, 50 Hun, 67; *Riggs v. Whitney*, 15 Abb. Pr. 388; *Taylor v. Baldwin*, 14 Abb. Pr. 166; *Miller v. Loeb*, 64 Barb. 454; *Merritt v. Merritt*, 16 Wend. 405; *De Groot v. Jay*, 80 Barb. 488; *Re Merritt*, 5 Paige, 129; *Noe v. Gibson*, 7 Paige, 518; *Parker v. Browning*, 8 Paige, 388; *Skinner v. Maxwell*, 68 N. C. 400; *Olds v. Tucker*, 35 Ohio St. 584; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Wray v. Hazlett*, 6 Phila. 155; *Chafes v. Quidnick Co.* 13 R. I. 442; *Payne v. Baxter*, 2 Tenn. Ch. 517; *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 115; *Re Merrill*, 54 Vt. 200; *Reed v. Aztell*, 84 Va. 231; *Melendy v. Barbour*, 78 Va. 544; *Davis v. Snead*, 83 Gratt. 705; *Brown v. Ranch*, 1 Wash. 500; *Garden City Bkg. & T. Co. v. Geilfuss*, 86 Wis. 622; *Littlejohn v. Turner*, 78 Wis. 124; *Jones v. Browne*, 82 W. Va. 444; *Russell v. East Anglian R. Co.* 3 Macn. & G. 104; *Ex parte Cochrane*, L. R. 20 Eq. 282; *Searle v. Choate*, L. R. 25 Ch. Div. 728; *Lane v. Capsey* [1891] 3 Ch. 411; *Evelyn v. Lewis*, 3 Hare, 472; *Ward v. Swift*, 6 Hare, 312; *Parr v. Bell*, 9 Ir. Eq. 55; *Re Perseus*, 8 Ir. Eq. 111; *Tink v. Rundle*, 10 Beav. 318; *Swaby v. Dickon*, 5 Sim. 639; *Angel v. Smith*, 9 Ves. Jr. 335; *Randfield v. Randfield*, 3 DeG. F. & J. 776.

The rule of not allowing suits against receivers without leave applies to United States courts, and will be maintained in those courts where the receiver has been appointed in a state court, even though the state court has

refused to permit the receiver to sue or be made a defendant. *Porter v. Sabin*, 149 U. S. 478, 87 L. ed. 815. And the rule applies to an action for personal injuries received on a railroad in the hands of a receiver; the recovery of a money demand, damages, or for the recovery of the property in the receiver's possession. *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672. And where the action is on a money demand, the complaint must allege leave of court obtained. *Keen v. Breckenridge*, 96 Ind. 69. It also applies to an action in tort where the permission is asked to pursue redress in an action at law. *Palys v. Jewett*, 82 N. J. Eq. 802. This is based on the ground that a chancery court will not try questions of tort.

Where a receiver appointed by the supreme court dies, a purchaser from one of the litigants pending the litigation will not be allowed to interfere with the possession of a new receiver by an independent suit, without leave of court first had and obtained by permission *pro interesse suo*.

Brien v. Paul, 3 Tenn. Ch. 357.

Any title such purchaser might acquire at a tax sale of the property would inure to the successful litigant.

Brien v. Paul, *supra*.

The rule that leave should be granted by the court appointing a receiver, before bringing suit against him, is sufficiently complied with where such leave is granted by the judge in vacation and the suit is afterwards tried by him in term time. *Wade v. Ringo*, 62 Mo. App. 414.

A service of summons on a receiver will be set aside where the plaintiff has not obtained permission of the court to maintain the action. *Maloney v. Atkins* 1 Lack. L. News, 252.

Permission of the court appointing a receiver must be obtained before

fied that there is a *prima facie* case established against the receiver,' and the petition can only be entertained by the court of equity making the appointment,' but where the court has once granted permission to sue it is a breach of judicial discretion to revoke such an order when costs have accrued in pursuance of such order by the person to whom permission is given.' Where the leave of court is asked permission will not be denied unless the claim is manifestly unfounded and vexatious.' It is the duty of the court to enquire into the facts before action is taken on the petition for leave.' The claimant must present his claim in the nature of a formal bill or petition containing appropriate allegations so that issues may be formed thereon.' Leave to serve the receiver of a corporation does not determine that the cause of action is a good one against the receiver, or that the receiver is liable.' A motion for leave to sue cannot be made in one judicial district while a general order made by the court in another district restraining all interference with the receiver is in force; the general order must first be vacated or modified;' nor will the court grant leave to sue its receiver out of its jurisdiction.' Where property has passed into the actual possession of the receiver,

commencing an action against him. *Melaney v. Atkins*, 4 Pa. Dist. R. 644.

The receivers of a railroad company located in another state may be sued in the courts of New York where leave is granted by the court appointing them. *Carrey v. Spencer*, 5 Inters. Com. Rep. 636, 72 N. Y. S. R. 108.

¹*Jordan v. Wells*, 3 Woods, 527; *Hills v. Parker*, 111 Mass. 508.

²*Palmer v. Scriven*, 21 Fed. Rep. 354; *Martin v. Atchison*, 2 Idaho, 590.

³*Conwell v. Lowrance*, 46 Kan. 83.

⁴*Palys v. Jewett*, 32 N. J. Eq. 302; *Lane v. Oapsey* [1891] 3 Ch. 411; *Randfield v. Randfield*, 3 DeG. F. & J. 766.

⁵*Lehigh Coal & Nav. Co. v. Central R. Co.* 88 N. J. Eq. 175.

⁶*Talladega Mercantile Co. v. Jenifer*

Iron Co. 102 Ala. 259; *Renfro v. Goetter*, 78 Ala. 314; *Cowles v. Andrews*, 39 Ala. 130.

In *Ex parte Printup*, 87 Ala. 148, the court say: "When a person not a party to a pending suit between whom and the complainant there is no privity, but who has a claim or lien on the property, or is interested in the subject-matter of the suit, desires for his own protection to present his claim, to assert his independent right, and raise new issues, he must do so by formal bill containing appropriate allegations—an original bill in the nature of a cross-bill or of a supplemental bill as the case may be.

⁷*Fleischauer v. Dittenhoefer*, 17 Jones & S. 311.

⁸*Wilkinson v. North River Const. Co.* 66 How. Pr. 423.

⁹*Central Trust Co. v. Wabash, St. L. & P. R. Co.* 23 Fed. Rep. 858.

leave to sue is necessary, even though the corporation for whose property the receiver is appointed obtained and retained possession wrongfully.¹ Leave will not be granted to establish a lien where the receiver has been appointed to prevent a multiplicity of suits and to determine all claims.²

As illustrating the extreme jealousy with which the court guards the possession of the receiver, and protects him from interference it has been held that where a judgment creditor obtained a judgment prior to the receiver's appointment, and levied on real estate and sold it afterwards without leave of court the deed issued on such sale was void, for the reason that the land being in the custody of the receiver was *in gremio legis* and no rights were obtained by the purchaser,³ though it is proper to state, in this connection, that the authorities upon the doctrine are not uniform.

§ 84. Exceptions to the rule.

To the foregoing rule requiring from the court appointing the receiver permission to sue the receiver, there are the following exceptions: (a) By act of Congress March 3, 1887, corrected by act of March 13, 1888, and known as the "Judiciary Act," it is

¹*Re Christian Jensen Co.* 128 N. Y. 550.

²*Re Herbst*, 63 Hun, 247. An original bill against a receiver by a party to the suit in which the receiver is appointed is unwarranted and a contempt of court. *Payne v. Baxter*, 2 Tenn. Ch. 517.

³*Dugger v. Collins*, 69 Ala. 324; to the same effect are *Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 323; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Martin v. Davis*, 21 Iowa, 535; *Bentley v. Shrieve*, 4 Md. Ch. 412. But see *Albany City Bank v. Schermerhorn*, 9 Paige, 372.

In *Wiswall v. Sampson*, *supra*, the court says: "The settled rule also appears to be that where the subject-matter of the suit in equity is real estate and which is taken into the possession of the court pending the litigation, by the appointment of a receiver,

or by sequestration the title is bound from the filing of the bill; and any purchaser *pendente lite*, even if for a valuable consideration comes in at his peril," citing *Orcuts v. Oldfield*, 3 Swanst. 278 note; *Bird v. Littlehales*, 3 Swanst. 299 note; *Anon.* 6 Ves. Jr. 287 (where a cause was referred to a master to determine whether the parties would be benefited by directing the receiver to defend in an action of ejectment); *Angel v. Smith*, 9 Ves. Jr. 335.

Where permission is given to sue the receiver and after suit was brought the party to whom permission was granted took proceedings to remove the cause to the United States court it was held the court granting such permission could revoke the order and dismiss the suit. *Meredith Village Sav. Bank v. Simpson*, 23 Kan. 414.

provided in section 3 as follows: "That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."¹

(b) Where a receiver is engaged in operating a railroad in another state than the one in which he is appointed, and is thus engaged in the business of a common carrier, he is liable to such actions at law as may be brought against him therein. Such receivers cannot be awarded exemptions from the ordinary common law

¹ 25 Gen. Stat. 433. It has been held that the terms of this statute are to be construed to extend to any court of competent jurisdiction, federal and state courts alike, and are not confined to the court appointing the receiver. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. Rep. 538; *McNulta v. Lochridge*, 141 U. S. 337, 35 L. ed. 796; *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 38 L. ed. 81; *Dillingham v. Russell*, 73 Tex. 47, 8 L. R. A. 634. Garnishment proceedings are not proceedings against a receiver for any act of his and are not subject to the provisions of said act. *Central Trust Co. v. East Tennessee, V. & G. R. Co. supra*. As to matters relative to the seizure of receivership property for the nonpayment of taxes, and the proper course of procedure, see *Re Tyler*, 149 U. S. 164, 37 L. ed. 689; consent not necessary to recover personal injuries by a passenger; *Fullerton v. Fordyce*, 121 Mo. 1; *Fordyce v. Withers*, 1 Tex. Civ. App. 540.

The general rule not allowing suit against a receiver without leave of the court appointing him does not apply to suits under federal laws involving

questions as to the validity of and infringements of letters patent. *Hupfeld v. Automaton Piano Co.* 66 Fed. Rep. 788.

A state statute exempting a receiver from garnishment has no effect in a federal court outside the state. *Central T. Co. v. Chattanooga, R. & C. R. Co.* 3 Am. & Eng. Corp. Cas. No. 493.

The Act of Congress of Aug. 18, 1888, allowing suits against federal receivers without leave, has no application to garnishment of a receiver in the court of his appointment. *Central T. Co. v. Chattanooga R. & C. R. Co.* 3 Am. & Eng. Corp. Cas. N. S. 493.

A garnishment proceeding against a receiver is not within Sayles's (Tex.) Civ. Stat. art. 1468, providing that a receiver in possession of property under order of the court may be sued in his official capacity, and if a judgment is recovered against him it shall be the duty of the court to order it paid out of funds in his hands as receiver. *Kreisle v. Campbell* (Tex.) 83 S. W. 852, denying writ of error in 83 S. W. 581.

liabilities of common carriers more extensive than they are allowed in the state in which they are appointed and in the state in which the cause of action occurred.¹

(c) Where the court issuing a garnishee process is in another state than the one in which the receiver is appointed, consent of the latter court has been held not to be necessary.²

(d) Where the purpose of the suit is not to disturb the receiver but fix the amount of damages sustained by reason of personal injuries, there being no injunction from the chancery court, and no leave to prosecute obtained, the judgment is held to be good.³

(e) Where a creditor obtains a judgment and levies upon and sells real estate of the debtor by virtue of a lien acquired under his judgment, he obtains a good title to the real estate as against a purchaser from the receiver who receives his title from the debtor by virtue of a conveyance made by order of court, subsequent to the attaching of the judgment lien, though no leave of court is asked or obtained.⁴

¹*Paige v. Smith*, 99 Mass. 395; *Folger v. Columbian Ins. Co.* 99 Mass. 276; *Blumenthal v. Brainard*, 38 Vt. 408. Where the same person is receiver of one railroad and lessee of another, both being operated by him together, a suit may be maintained at law without leave for injuries resulting from the negligence of his servants in operating the leased road. *Lyman v. Central Vermont R. Co.* 59 Vt. 167. And such action may be maintained against the receiver where the injury occurred at a point where the receiver was in charge. *Lyman v. Central Vermont R. Co.* 59 Vt. 167.

²*Phelan v. Ganabin*, 5 Colo. 14. In this case it was held that where leave might be properly sought, a failure to do so was nothing more than a contempt of the appointing court, and was not a bar to the jurisdiction of a court of law, and no defense to an otherwise legal action, and is contrary to the doctrine announced in *Wiswall*

v. Sampson, 55 U. S. 14 How. 52, 14 L. ed. 822; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; and other English and American authorities, but is sustained in principle by *Albany City Bank v. Schermerhorn*, 9 Paige, 372. See also *Fithian v. New York & E. R. Co.* 31 Pa. 114.

³*Kinney v. Crocker*, 18 Wis. 74; *Allen v. Central R. Co.* 42 Iowa, 688. See also *Paige v. Smith*, 99 Mass. 395; *Hill v. Parker*, 111 Mass. 506; *Camp v. Barney*, 4 Hun, 378; *Chautauque County Bank v. Risley*, 19 N. Y. 376; *Contra, Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 822.

⁴*Chautauque County Bank v. Risley*, 19 N. Y. 369; the principle upon which this decision is based in that the obtaining of leave of the chancery court appointing a receiver is not a jurisdictional fact affecting the legality of the sale, or the validity of the title thereunder, though, perhaps, subjecting the person to punishment for con-

(f) Where the receiver has sold property that does not belong to or is not a part of the receivership property he may be sued by the owner in an action of trover without obtaining an order for leave to sue.¹

(g) Where a receiver has joined issue without objection it is too late to urge that leave to sue was not obtained.²

Although the general rule is that a party must apply to the court for leave before he sues a receiver, yet an action brought against a receiver without leave is regular until the court interferes, and a judgment therein is valid.³

tempt, but see *contra Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322.

¹*Kenney v. Ranney*, 96 Mich. 617; in this case Hooker, Ch. J., says: "We understand it to be the settled law, that when one by a trespass takes the property of another and sells it he is liable for the conversion, and that no demand is necessary, and the question of good or bad faith is not necessarily involved. This doctrine is applied solely in cases against sheriffs and constables where property is unlawfully seized and sold upon execution. The defendant wrongfully took property of the plaintiff and sold it. It is no defense to say, 'I supposed I had authority to do so.' He should have seen to it that he sold no property except that mortgaged."

In the case of *Hills v. Parker*, 111 Mass. 508, the court say: "The decree of a court of chancery appointing a receiver entitled him to its protection only in the possession of property which he is authorized or directed by the decree to take possession of. When he assumes to take or hold possession of property not embraced in the decree appointing him and to which the debtor never had any title, he is not acting as the officer or representative of the court of chancery, but is a mere trespasser, and the right-

ful owner of the property may sue him in any appropriate form of action for damage or to recover possession of the property illegally taken or detained." Citing *Parker v. Browning*, 8 Paige, 388; *Paige v. Smith*, 99 Mass. 395; *Leighton v. Harwood*, 111 Mass. 67; *In Re Young*, 7 Fed. Rep. 855, *Curran v. Craig*, 22 Fed. Rep. 101; but see *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672.

²*Elkhart Car Works v. Ellis*, 118 Ind. 215; *Jay's Case*, 6 Abb. Pr. 298; *Hubbell v. Dana*, 9 How. Pr. 424; *Re Young*, 7 Fed. Rep. 855; *Naumburg v. Hyatt*, 24 Fed. Rep. 898.

³*Hackley v. Draper*, 4 Thomp. & C. 614, affirmed in 60 N. Y. 88. It has been held, however, that leave to sue is a jurisdictional requisite which cannot be waived by the receiver, and under the Washington Code can be raised at any time. *Brown v. Rauch*, 6 Wash. 500; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Keen v. Breckenridge*, 96 Ind. 69; *Martin v. Atchison*, 2 Idaho, 590, and *Thompson v. Scott*, 4 Dill. 508. The contrary doctrine is held in *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225; in that case it was conceded that the court appointing a receiver might draw to itself all controversies to which the receiver is a party, or which affect the property under his control, yet it

§ 85. In what court receiver may be sued.

Where it is claimed that the plaintiff has equitable rights which are superior to the rights of the receiver derived under the order of court, the court in which the receiver was appointed is the only court that can pass upon such conflicting rights, and it must be in the cause in which the receiver was appointed and not by an independent suit.¹ But in a case where disputed facts are involved the court may, on its own motion, or on the proper application of the parties permit a suit at law to be brought for the purpose of determining and settling the disputed facts, or direct the trial

does so only by direct action upon parties by way of injunction or proceedings as for contempt, and the appointment in no manner affects the ordinary jurisdiction of other tribunals. And to the same effect is *Mulcahey v. Strauss*, 151 Ill. 70; *Kinney v. Crocker*, 18 Wis. 74; *Roxbury v. Central Vermont R. Co.* 60 Vt. 121; *Lyman v. Central Vermont R. Co.* 59 Vt. 167, and *Allen v. Central R. Co.* 42 Iowa, 688. In *Blumenthal v. Brainerd*, 88 Vt. 402, the court say: "A court of chancery will protect a person acting under its process on authority, in the execution of a decree or decretal order against suits at law; and will compel parties to apply to that court for relief. This protection is accorded by that court to its officers only on their own application and is granted by the chancellor in the exercise of his discretion and it is to be presumed that it would be granted in any necessary or proper case for such relief." Whether the court will try all controversies in the case in which the receiver is appointed or refer the matter to another court in an independent proceeding is wholly a matter in its discretion. *Kennedy v. Indianapolis, C. & L. R. Co.* 3 Fed. Rep. 97; *Melendy v. Barbour*, 78 Va. 544. If equitable rights are involved the court will hear them on petition.

Porter v. Kingman, 126 Mass. 141; *Olds v. Tucker*, 35 Ohio St. 581. The right to appeal in such cases is not granted except for abuse. *Mechanics' Nat. Bank v. Landauer*, 65 Wis. 44.

Every claim presented against a fund in the hands of a receiver, if contested before the court appointing the receiver, becomes, in effect, a suit against the receiver and is ended by a final judgment allowing or rejecting the claim; and any party in the contest desiring to appeal may do so. *Fagan v. Boyle Ice Mach. Co.* 65 Tex. 324. Cf. *Cowdrey v. Galveston, H. & H. R. Co.* 93 U. S. 352, 23 L. ed. 950.

¹*Porter v. Kingman*, 126 Mass. 141; citing *Columbia Book Co. v. De Golyer*, 115 Mass. 67; *Atlas Bank v. Nahant Bank*, 23 Pick. 480; *Winwall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322; *Noe v. Gibson*, 7 Paige, 518; *Andrews v. Stanton*, 18 Ill. App. 163; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Russell v. East Anglian R. Co.* 3 Macn. & G. 104; *Mechanics' Nat. Bank v. Landauer*, 68 Wis. 44; *Pacific R. Co. v. Wade*, 91 Cal. 449, 18 L. R. A. 754; *Re Merrill*, 54 Vt. 200; *Olyphant v. St. Louis, Ore. & S. Co.* 28 Fed. Rep. 729; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 28 Fed. Rep. 871; *Olds v. Tucker*, 35 Ohio St. 581.

of a feigned issue to settle the facts.¹ It has been contended that by reason of the chancery court, in which the receiver is appointed, drawing to itself all matters of claims against the receiver and compelling a trial of the issues in that court, it is, in effect, a violation of the constitutional right of trial by jury,² but inasmuch as the constitutional right of a trial by jury does not extend to cases of equity jurisdiction, that question has no valid significance.³ Neither is the rule requiring consent altered by the constitutional right to sue in federal courts in certain cases.⁴ The granting of leave to sue in an independent action, or refusal, rests in the sound discretion of the court to which application is made, and the appellate court will not interfere unless there has been a manifest abuse of the discretion.⁵

¹*Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Wyatt v. Ohio & M. R. Co.* 10 Ill. App. 289. This was a suit against a railroad company over which a receiver had been appointed. A federal court receiver may be sued in a state court. *Southern P. R. Co. v. Maddox*, 75 Tex. 800; *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225.

²*Palys v. Jewett*, 82 N. J. Eq. 302; *Kinney v. Crocker*, 18 Wis. 74; *Allen v. Central R. Co.* 42 Iowa, 688; *Pacific R. Co. v. Wade*, 91 Cal. 449, 18 L. R. A. 754.

³*Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Providence Rubber Co. v. Goodyear*, 76 U. S. 9 Wall, 788, 19 L. ed. 566; *Illinois C. R. Co. v. Turrill* ("Carwood Patent"), 94 U. S. 695, 24 L. ed. 238; *Marsh v. Seymour*, 97 U. S. 348, 24 L. ed. 963.

⁴*Reed v. Axtell*, 84 Va. 281; *Melendy v. Barbour*, 78 Va. 544, but see *Barton v. Barbour*, 140 U. S. 126, 26 L. ed. 672; *Brown v. Rauch*, 1 Wash. 497, where it is held that obtaining leave is a jurisdictional fact.

⁵*Mechanics' Nat. Bank v. Landauer*, 68 Wis. 44; *Meeker v. Sprague*, 5 Wash. 242. Though the receiver cannot appeal in a suit against him the

opposite party may. *Melendy v. Barbour*, 78 Va. 544; *Mechanics' Nat. Bank v. Landauer*, 68 Wis. 44. And permission may be revoked by the court granting permission. *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414; *Henderson v. Walker*, 55 Ga. 481.

The discretion above referred to resting with the court relates to the matter of granting leave to bring an independent suit, or of requiring the applicant to intervene, in the original suit in which the receiver is appointed, by petition. *Davis v. Michelbacher* (Wis.) 81 N. W. 160; *Melendy v. Barbour*, 78 Va. 544; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 23 Fed. Rep. 858; and if the interested parties are required to intervene it likewise is in the discretion of the court whether the issue shall be tried by a jury or referred to a master. *Kennedy v. Indianapolis, C. & L. R. Co.* 8 Fed. Rep. 97. It is an exceptional case under peculiar facts and circumstances where the court will permit a suit against a receiver in another court. *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414; *Re Platt*, 52 How. Pr. 468; *Palmer v.*

In all cases where it is necessary to make the receiver a defendant by leave of court, the bill or petition must allege that it is filed by such leave of court.¹

Actions against a receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasance, negligence and liability are official and not personal, and judgments against him as receiver are payable only from the funds in his hands.²

§ 86. Suits against receiver for negligence.

After leave of court the receiver of an insolvent railroad company may be sued for the negligence of his employees, resulting in a passenger's death,³ but he is not a proper defendant, and ought not to be substituted for the railroad company in an action for a trespass committed by the company before his appointment.⁴ But he may be a defendant in an action of tort growing out of the acts of the servants of his predecessor;⁵ not, however, for injuries resulting in death caused by negligence of his employees, where the suits are exclusively statutory.⁶ It is otherwise, however, where the proceeding is based upon the negligence of his agents in operating a railroad, where the suit is a common law proceed-

Scriven, 21 Fed. Rep. 354. Where permission is given to sue in another court, the judgment if rendered against the receiver must be presented as a claim and the method of payment determined by the court granting leave to sue and in which the receiver was appointed. *Harding v. Nettleton*, 86 Mo. 658.

¹ *Burk v. Muskegon Mach. & F. Co.* 98 Mich. 614; *Steel Brick Siding Co. v. Muskegon Mach. & F. Co.* 98 Mich. 616.

² *McNulta v. Lochridge*, 141 U. S. 327, 35 L. ed. 796, affirming 137 Ill. 270; *Texas & P. R. Co. v. Cox*, 145 U. S. 598, 36 L. ed. 829; *The St. Nicholas*, 49 Fed. Rep. 671; *Woodruff v. Jewett*, 37 Hun, 205.

³ *Little v. Dusenberry*, 46 N. J. L. 614; *The St. Nicholas*, 49 Fed. Rep. 671.

⁴ *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480, reversing 33 N. Y. S. R. 541; *Pringle v. Woolworth*, 90 N. Y. 502; *Arnold v. Suffolk Bank*, 27 Barb. 424; *Fleischauer v. Dittenhofer*, 17 Jones & S. 311; *Metropolitan Trust Co. v. Tonawanda S. & C. R. Co.* 103 N. Y. 245; *Raht v. Attrill*, 106 N. Y. 423. But see *Pickersgill v. Myers & L. F. Ins. Co.* 99 Pa. 602; *Combs v. Smith*, 78 Mo. 32.

⁵ *McNulta v. Lochridge*, 137 Ill. 270, affirming 82 Ill. App. 86, and affirmed in 141 U. S. 327, 35 L. ed. 796. Or a tort of the corporation before his appointment. *Combs v. Smith*, 78 Mo. 32; *Com. v. Runk*, 26 Pa. 235.

⁶ *Houston & T. O. R. Co. v. Roberts* (Tex.) 19 S. W. 512; *Texas & P. R. Co. v. Collins*, 84 Tex. 121; *Yookum v. Selph*, 83 Tex. 607; *Turner v. Cross*, 88 Tex. 218, 15 L. R. A. 262.

ing.¹ Mandamus is not sustainable against a corporation and receiver where the latter is proceeding in the execution of his trust under the directions and orders of the court appointing him.²

§ 87. When suits against him may be enjoined.

In proceedings for the dissolution of an insurance company where a receiver has been appointed, the court may enjoin an action brought by a policy holder against such receiver for the purpose of declaring the debts and obligations of the company and distributing the assets,³ and generally where the result of the

¹ *Little v. Dusenberry*, 46 N. J. L. 614. In this character of case it has been held that leave of court is not required.

² *State, Washington County Comrs. v. Marietta & C. R. Co.* 35 Ohio St. 154; *Merrill v. Lake*, 16 Ohio, 405.

³ *Atty. Gen. v. North America L. Ins. Co.* 6 Abb. N. C. 298. In an action brought by the attorney general under the statutes, such policy holders may appear, even after the appointment of a receiver, and be made parties to the action, and thus give them the right to appeal in matters affecting their interests. So also will a suit be enjoined where the defendant in an action brought by a widow entitled to dower, where such defendant has been placed in possession by a receiver. *Coleman v. Glanville*, 18 Grant Ch. (Ont.) 42. If an action to recover though friendly will hamper the court and receiver in the performance of their duties, and greatly increase the costs and expenses of the trust, it should be enjoined. *Atty. Gen. v. North American L. Ins. Co. supra*. The rule is stated in *Evelyn v. Lewis*, 8 Hare, 472, by the vice chancellor as follows: "If a party claiming a right in the same subject-matter was in possession of the rights which he claimed at the

time the receiver was appointed, the appointment of the receiver left him in such possession; if, on the other hand, the claimant was out of possession, he must apply for the leave of this court before he instituted any legal proceedings affecting the possession which the receiver had acquired. The court had then an opportunity of considering and in a sense of trying the right of the applicant to proceed at law before it sanctioned the proceeding. How far that preliminary trial in this court should go might depend on the circumstances of the case. Whether the party proceeding at law did or did not know that a receiver had been appointed over the property, or however clear the right of the claimant might be, the court would restrain the prosecution of the claim if it were instituted without the leave of this court." Cf. *Tink v. Rundle*, 10 Beav. 318; *Re Persse*, 8 Ir. Eq. 111; *Batchelor v. Blake*, 1 Hog. 98; *Swaby v. Dickon*, 5 Sim. 629; *Parr v. Bell*, 9 Ir. Eq. 55.

And where a petition is filed in the court in which the receiver was appointed for leave to sue the receiver, the petition must state a *prima facie* cause of action against him. The court should not allow its receiver to be harrassed by a suit where, accord-

suit will disturb the possession of the receiver, the suit will be restrained if prosecuted without the consent of the court.

In a special proceeding to wind up a corporation and distribute its assets, where a suit is brought against the receiver, the inevitable effect of which is to interfere with the action of the receiver and hamper and annoy him in the performance of his duty, and when the person suing has ample opportunity in the original proceeding in which the receiver is appointed to obtain all his rights, the court will enjoin a suit instituted against a receiver.¹ But this protection by injunction will not be extended to a case in which it is uncertain whether the receiver is personally or officially liable.² The court will not permit a suit against a receiver to restrain him, even when the act complained of is beyond the scope of the receiver's power.³ But in such case the application for relief should be made in the case in which the receiver was appointed. In regard to the protection of the court to the receiver, by injunction or otherwise, it must be understood to have reference to the receivership property, and not property which the receiver may take possession of not embraced in the order of appointment.⁴

§ 88. Receiver's defenses.

Unless restricted by order of court, the receiver in an action to liquidate partnership affairs, may intervene in a suit against the firm and set up as many defenses as he may have reason to believe can be sustained, notwithstanding such defenses might inure to the benefit of the members of the firm, though not pleaded by them;⁵ and in an action for personal injuries received during the time he is operating a railroad he may plead the statute of limitations.⁶ The fact that a railroad is in the hands of a receiver is no defense to an action brought on a statutory liability for a

ing to his own showing, the plaintiff has no cause of action. *Jordan v. Wells*, 8 Woods, 527. And it seems that leave may be granted without notice. *Potter v. Brunnell*, 20 Ohio St. 150.

¹ *Atty. Gen. v. North America L. Ins. Co.* 6 Abb. N. C. 293. But see *Jay's Case*, 6 Abb. Pr. 293.

² *Re The Original Hartleypool Collieries Co.* 51 L. J. Ch. 508.

³ *Searle v. Choat*, L. R. 25 Ch. Div. 723. And this is especially so under the Judicature Acts.

⁴ *Curran v. Craig*, 22 Fed. Rep. 101; *Re Young*, 7 Fed. Rep. 855.

⁵ *Honegger v. Wettstein*, 15 Jones & S. 125.

⁶ *Bartlett v. Keim*, 50 N. J. L. 260.

failure to fence the road.¹ In general, a receiver may, and it is his duty, to defend on all legal grounds where the action may result in a judgment against funds or property in his possession, and as a rule all defenses that might have been available had a receiver not been appointed, are available to him in his official capacity.² To be entitled to costs for defending he must procure consent of the court to do so.³

§ 89. Character of judgment against receiver.

In an action brought by a creditor of a corporation against a receiver thereof no personal judgment can be rendered against the receiver; it must be against him in his official character, and must be payable out of the funds of the receiver held by him in his official character.⁴ A judgment in a state court is not conclusive as against a receiver in a United States court, where suit was brought without leave, and the latter court may inquire whether the intervenor, in whose favor the state court rendered judgment, has a lien and the rank and amount thereof.⁵ The contracts, misfeasances, negligence, and liabilities of the receiver are official, and not personal.⁶ A judgment against a corporation

¹ *Ohio & M. R. Co. v. Russell*, 115 Ill. 52.

The fact that a receiver has been discharged is no answer to a motion for leave to bring an action against him for the claim and delivery of property, where it appears that the claimants of the property had no notice of the motion to discharge the receiver, although he was aware of the claim; and that the receiver had sold the property claimed, after notice of the claim, and after the service upon him of a petition and notice of motion for leave to prosecute. *Miller v. Loeh*, 64 Barb. 454. After a receiver has distributed money in his hands, however, after notice to creditors, the court will not maintain a bill by a creditor who did not file his claim. *Keene v. Snowden*, 56 Md. 343.

² *Davis v. Duncan*, 19 Fed. Rep.

477; *McEvers v. Lawrence*, Hoffm. Ch. 172.

³ *Conyers v. Crosbie*, 6 Ir. Eq. 657; *Anon.* 6 Ves. Jr. 287; *Reynolds v. Pettyjohn*, 79 Va. 327.

⁴ *Woodruff v. Jewett*, 37 Hun, 205; *Hall v. Smith*, 2 Bing. 156; *Combs v. Smith*, 78 Mo. 32; *Camp v. Barney*, 4 Hun, 373; *Com. v. Runk*, 26 Pa. 235; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Meara v. Holbrook*, 20 Ohio St. 137; *Thompson v. Scott*, 4 Dill. 508; *Brown v. Brown*, 71 Tex. 355. If the judgment is against a receiver in another court than that in which he is appointed it is error to attempt to fix the fund out of which the judgment is payable. *Id.*

⁵ *Missouri P. R. Co. v. Texas P. R. Co.* 41 Fed. Rep. 811.

⁶ *McNulta v. Lochridge*, 141 U. S. 327, 35 L. ed. 796.

When a corporation is dissolved

in another state after the dissolution of the corporation in the state of its domicile where the receiver was not a party to the proceeding in which the judgment was rendered, is a nullity.

§ 90. Receiver a party, when necessary.

In a case pending at the time of the appointment of a receiver growing out of the negligent construction of a railroad, it is not necessary to make the receiver a party; he may intervene and make defense if he desires to do so.¹ Nor is he a necessary party to an action brought by creditors to establish the right of parties to the assets,² nor to a foreclosure proceeding where the bill was taken for confessed before the receiver was appointed;³ but where the receiver asks to be made a party it can be done at any stage of the proceedings.⁴ When a suit is brought to enforce a contract of the defendant railroad company, the receiver, being in possession of the property, is the only necessary party.⁵

and its franchises, rights and privileges forfeited in the state of its domicile from that time, it has no legal existence, and a judgment subsequently rendered in another state against the corporation is invalid where the receiver is not made a party to the proceeding, and it seems that in order to be made a party so as to bind the receivership effects it must be done by order of the court appointing. *Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574, affirming 106 N. Y. 619; *sub nom. People v. Knickerbocker L. Ins. Co.*, reversing 43 Hun, 574. And see *McCulloch v. Norwood*, 58 N. Y. 562, modifying 4 Jones & S. 180.

¹ *Mercantile Trust Co. v. Pittsburg & W. R. Co.* 29 Fed. Rep. 732; *Tracy v. First Nat. Bank*, 37 N. Y. 523.

² *Mechanics' Nat. Bank v. Landauer*, 68 Wis. 44.

³ *Willink v. Morris Canal & Bkg. Co.* 4 N. J. Eq. 377. That the receiver is not a party cannot be made an objection by a third party; a receiver has no standing in a case pending

when appointed until he has become a party to the suit. *Tracy v. First Nat. Bank*, 37 N. Y. 523.

⁴ *Willink v. Morris Canal & Bkg. Co. supra*. The court exercises its discretion as to allowing the receiver permission to defend an action against the person or corporation for whom he is appointed, and is not subject to review. *Patrick v. Ellis*, 10 Kan. 680.

⁵ *Southern Exp. Co. v. Western N. O. R. Co.* 99 U. S. 191, 25 L. ed. 319.

A surviving partner was made a receiver of the partnership property, with the power usually conferred upon receivers. In his individual capacity, but not as receiver, he was made a co-defendant in a foreclosure suit. Held, that as receiver he was not a necessary party, and that his successor in the receivership could not maintain a bill to redeem. *Kirkpatrick v. Corning*, 37 N. J. Eq. 54.

When the receiver alleges upon information and belief collusion between the plaintiff and defendant, and asks leave to intervene and defend, it was held that he had no

§ 91. Receiver may be restrained.

If it appears that a receiver is prosecuting a suit which is unjust and vexatious he may be restrained by the court making the appointment and the application may be made by any person affected by the unjust prosecution whether he be a party to the suit or not.¹ The general rule, however, is that the court will not permit its receiver to be enjoined in another action, the proper course for parties aggrieved, being to appear in the action in which the receiver is appointed and apply for relief.²

§ 92. Effect of discharge of receiver as to suits against him.

After a receiver has been discharged and the receivership property, by action of the court, has all been taken out of his hands, thereafter the receiver ceases to represent anyone and he cannot

such interest in the controversy as authorized him to defend; that the most the receiver had a right to claim was the protection of the funds in his possession, and if protected by the judgment it was all he could demand. *Honegger v. Wettstein*, 94 N. Y. 252.

In *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480, a receiver was appointed in a mortgage foreclosure proceeding of a railroad, and at the time of such appointment a trespass proceeding was pending against the railroad company, and it was held that the functions of the receiver were confined to the care and preservation of the property included in the mortgage; that he did not represent the corporation or supersede it in the exercise of its powers except in relation to the possession and management of the property committed to his charge; and that with the particular cause of action set out in the complaint he had no connection, and it could in no possible way be charged upon the property in the receiver's possession. *Metropolitan Trust Co. v.*

Tonawanda S. & C. R. Co. 103 N. Y. 245; *Raht v. Attrill*, 106 N. Y. 423; *Arnold v. Suffolk Bank*, 27 Barb. 424.

When a receiver has been duly appointed in proceedings supplementary to execution he ought not to be made a party defendant to an action praying to enjoin him from discharging his trust. The proper proceeding is to apply to the appointing court for instructions. *Van Rensselaer v. Emery*, 9 How. Pr. 135. Cf. *Smith v. Earl of Effingham*, 2 Beav. 232; *Winfeld v. Bacon*, 24 Barb. 154.

¹*Alepaugh v. Adams*, 80 Ga. 345; *Field v. Jones*, 11 Ga. 418; *Lehigh Coal & Nav. Co. v. Central R. Co.* 41 N. J. Eq. 167; *Merritt v. Merritt*, 16 Wend. 405. In this case an order was entered directing a receiver to discontinue a suit at law prosecuted by him, which appeared to be for the purpose of harrassing the defendant.

Re Merritt, 5 Paige, 125.

²*Winfeld v. Bacon*, 24 Barb. 154; *Smith v. Earl of Effingham*, 2 Beav. 232.

act for or represent the company, or its creditors or any other person, and manifestly for this reason the court cannot make an order that the receiver should pay a creditor, having no funds out of which to make such payment.¹ And the court will not permit a person thereafter to litigate a claim against the discharged receiver,² even where the proceeding was pending when the receiver was discharged, and the claimant had no notice of the discharge or proceedings therefor.³

¹*Farmers' Loan & T. Co. v. Central R. Co.* 2 McCrary, 181.

A judgment cannot be rendered against a receiver after his discharge and after he has surrendered the assets in his hands to the corporation, though he was in possession when suit was commenced. *Bond v. State*, 68 Miss. 648; *Reynolds v. Stockton*, 140 U. S. 271, 35 L. ed. 469.

²*New York & W. U. Teleg. Co. v. Jewett*, 115 N. Y. 166; *Milwaukee & M. R. Co. v. Soutter*, 69 U. S. 2 Wall. 510, 17 L. ed. 900.

³Note 2, *ante*; *Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 840, 876; but see *contra*, *Miller v. Loeb*, 64 Barb. 454. The court itself has the care of the property and the receiver is but its creature. *Bostwick v. Menck*, 40 N. Y. 883; *Rinn v. Astor F. Ins. Co.* 59 N. Y. 147. The proceeding though in form against the receiver is

in substance a proceeding *in rem* against the fund in possession of the court, and in no event involves a liability of the receiver either directly or indirectly. *Winfield v. Bacon*, 24 Barb. 161; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Cardot v. Barney*, 63 N. Y. 281.

In *Woodruff v. Jewett*, 115 N. Y. 267, the claimant had reduced the claim to a judgment and the liability of the receiver was fixed, and under this state of facts the receiver made application and was discharged without notice to the claimant, and it was held that the liability of the receiver to pay the judgment was a question of doubt under the particular circumstances of the case, though the court reaffirmed the doctrine of *New York & W. U. Teleg. Co. v. Jewett*, *supra*, under the circumstances therein. Cf. *Johnson v. Powers*, 21 Neb. 292.

CHAPTER VIII.

LIABILITY OF RECEIVER.

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| § 109. Generally. | § 124. Liability on leases made without order of court. |
| (a) When liable. | § 125. On contracts other than leases. |
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| § 115. Corporation in hands of receiver not liable. | § 130. For disobeying orders of court. |
| § 116. Liability for use of receivership funds. | § 131. To account. |
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| § 118. For supplies, labor, etc. | § 133. Effect of discharge. |
| § 119. For money deposited in bank. | § 134. Liability for unjust freights exacted. |
| § 120. For costs and expenses. | § 135. Power of court over executors of receivers. |
| § 121. For rents. | § 136. Liability for contempt of court. |
| § 122. On unexpired leases. | |
| § 123. Adoption of lease by receiver. | |

§ 109. Generally.

Being an officer of court, and being placed in custody of the property or funds which the court is called upon to preserve until the right of parties thereto are determined, and in the end to distribute according to the equities as established, the receiver occupies towards the court, and to the parties, a quasi trust relationship, and assumes responsibilities so far as the safety of the trust property is concerned commensurate with the character of the duties assumed. It has been said that absolute safety is to be aimed at, and not only that, but it is the duty of the receiver to put the property in such shape as to lessen the expense of care and oversight. And it is necessary for him, in all things, to act in the utmost good faith, concerning the property in his charge, and use his best judgment in his management of the trust estate. He has no power to pay claims at will, and generally, can exer-

cise only such powers as are given to him by the order of his appointment, or as are given by the usual course of practice in courts of equity,¹ and while he should, as a rule, pay out nothing except on order of court, yet the rule is not so unbending and inequitable as to disallow the receiver credit in his account for payments made in good faith where, if authority had been applied for, it would have been granted;² and the receiver will be protected in paying out money in good faith although the order of payment may have been improvidently made.³ Where the re-

¹*Derendorf v. Dickinson*, 21 How. Pr. 275. Under the early English practice a receiver was not allowed to pay out anything on account of the estate without a previous order, but under the later practice the matter of payment is referred to a master to see if the payment is for the benefit of the parties interested. *Tempest v. Ord*, 2 Meriv. 55.

²*Adams v. Woods*, 15 Cal. 206.

Brown v. Hazlehurst, 54 Md. 26. In this case the court say: "As a general rule a receiver will not be permitted to lay out more than a small sum at his own discretion in the preservation and improvement of property, yet this general rule should not be applied so as to work injustice where the receiver has acted in good faith and under such circumstances as will enable the court to see that if previous authority had been applied for it would have been granted. Cf. *Willis v. Sharp*, 124 N. Y. 406, where it is held that if he pays out money in good faith and in obedience to the orders of court to parties not entitled to it he cannot be compelled to make restitution; and in *Adams v. Haskell*, 6 Cal. 475, it is said that receivers and other custodians of money coming to their hands under the order of court, being bound to obey the orders of court in regard as well to its safe custody as to its return, are correlatively

entitled to the protection of the court against loss for disbursements which were such as a reasonable and prudent man acting as receiver would have been justified in making. In *Edes v. Strunk*, 85 Neb. 307, an order appointing a receiver was regular on its face and apparently within the jurisdiction of the court and therefore *prima facie* valid under which the receiver collected money and applied the same in payment of taxes and for repairs which were necessary, such an order is a sufficient justification in a suit brought against the receiver to recover rents collected by him after the order appointing him has been vacated for want of sufficient notice of the application. If, however, the receiver claims rights or property he, in such case, is required to show a valid appointment, though it is unnecessary to show each step taken in the proceeding. (See *Johnson v. Powers*, 21 Neb. 292, distinguished.) Cf. *Re O'Connor*, 47 N. Y. S. R. 415; *Rockwell v. Merwin*, 45 N. Y. 166.

³*Re Home Provident Safety Fund Asso.* 39 N. Y. S. R. 437, reversed on other grounds but sustained in this particular in 129 N. Y. 288. Cf. *Willis v. Sharp*, 124 N. Y. 406.

Palmer v. Truby, 136 Pa. 556. Where a receiver has accounted to a guardian of an infant he will not be obliged to account again to the infant

ceiver has acted with evident caution and for what he deemed the best interests of the estate and a loss occurs, without fault on his part, he will not, ordinarily, be required to make good such loss.¹ In making payments he should in all cases take receipts from the persons to whom payments are made.²

(a) WHEN LIABLE.

In general the receiver will be liable:

(1) For mingling the receivership funds with his private funds, whereby the funds are lost through the failure of the bank;³ or where he deposits the receivership funds in a bank and receives interest on the deposits and the bank fails;⁴ or where the funds are deposited with a bank in such a way as to be beyond his control, and the bank fails;⁵ or deposits the funds in a bank without authority of court.⁶

(2) The receiver of a bank will be responsible to a creditor of the bank for funds of such creditor received by it and mingled with the funds of other creditors in such a way as to be undistinguishable, but only to the extent of, the *pro rata* share of such

on his becoming of age. *Clavering's Case*, Prec. Ch. 535; *Wildridge v. McKane*, 2 Moll. 545.

¹*Powers v. Loughridge*, 38 N. J. Eq. 396; *Knight v. Lord Plymouth*, 3 Atk. 480; *Re Union Bank*, 37 N. J. Eq. 420, 424, affirmed on appeal as *Sandford v. Clark*, 38 N. J. Eq. 265.

In *Powers v. Loughridge*, the receiver intrusted a claim, for which a suit was not actually necessary, in good faith, in the hands of a lawyer of another state of whose integrity, on inquiry, he was satisfied, and such lawyer absconded, it was held the receiver was not liable for the loss.

Property lost while in the hands of a receiver,—as here, slaves emancipated,—being *in custodia legis*, cannot be considered as lost by conversion, so as to render the obligors of any bond for its return, etc., liable therefor. *Wall v. Pulliam*, 5 Heisk. 365.

²*Heffron v. Rice*, 40 Ill. App. 244.

Expenses incurred by a debtor in

carrying into effect a scheme which he believes will enable him to pay interest to security-holders, but which in fact, does not accomplish such result, cannot be charged to the receiver. *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023.

An "officer" or "employee" within the meaning of the statute means those who are regularly employed by the company, and not those who are employed for a special transaction. *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023.

³*Wren v. Kirton*, 11 Ves. Jr. 377.

⁴*Drever v. Maudesley*, 13 L. J. Ch. N. S. 433.

⁵*Salway v. Salway*, 2 Russ. & M. 215; *Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 94.

⁶*State, Collins, v. Gooch*, 97 N. C. 186; *Ricks v. Broyles*, 78 Ga. 610. But see *Rowth v. Howell*, 3 Ves. Jr. 565.

creditor.¹ He will, however, be responsible for goods consigned to a commission merchant, where such goods can be traced and identified, the title in such case not having passed from the consignor to the consignee and then to the receiver.²

(3) He will be liable personally for trespass and torts committed by him, his official position being no protection in such cases.³

(4) Where operating a railroad as a common carrier, he will be liable as such.⁴

(5) And for disobeying the orders of court;⁵

(6) And for loss occasioned by his negligence;⁶

(7) And for negligence in the management of receivership property.⁷

¹*People v. Merchants & M. Bank*, 78 N. Y. 269; *Atty. Gen. v. Continental L. Ins. Co.* 71 N. Y. 325; *Butler v. Sprague*, 66 N. Y. 392; *Otis v. Gross*, 96 Ill. 612; *Illinois Trust & Sav. Bank v. Smith*, 21 Blatchf. 275; *St. Louis & S. F. R. Co. v. Johnston*, 27 Fed. Rep. 243. But see *Thompson v. Gloucester City Sav. Inst.* (N. J.) 8 Atl. 97.

²*Francklyn v. Sprague*, 10 Hun, 589.

³*Staples v. May*, 87 Cal. 178; *Hills v. Parker*, 111 Mass. 508. But see *Walling v. Miller*, 108 N. Y. 173; *Manning v. Monaghan*, 1 Bosw. 459, 23 N. Y. 539; *Kenney v. Ranney*, 96 Mich. 617; *Gutach v. McIlhargy*, 69 Mich. 377; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 357; *Curran v. Craig*, 23 Fed. Rep. 101.

⁴*Paige v. Smith*, 99 Mass. 395, *Ex parte Brown*, 15 S. C. 518; *Howe v. Gibson*, 3 Tex. Civ. App. 263; *Yoakum v. Dunn*, 1 Tex. Civ. App. 524; *Razbury v. Central Vermont R. Co.* 60 Vt. 121; *Melendy v. Barbour*, 78 Va. 544; *People v. Yoakum* (Tex. Civ. App.) 25 S. W. 1001; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Turner v. Indianapolis, B. & W. R. Co.* 8 Biss. 527; *Davenport v. Alabama & C. R. Co.* 2 Woods, 579; *Easton v. Houston & T. C. R. Co.* 88 Fed. Rep. 12; *Penn-*

sylvania Finance Co. v. Charleston, C. & C. R. Co. 46 Fed. Rep. 508.

⁵*State v. Gibson*, 21 Ark. 140; *Cartwright's Case*, 114 Mass. 230; *People v. Jones*, 33 Mich. 303; *McCay v. Black*, 14 Phila. 635; *Carr v. Morris*, 85 Va. 21; *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 L. ed. 819; *Harman v. Foster*, 1 Hog. 318; *Felnam v. Kirby*, 4 Ir. Eq. 320; *Hicks v. Hicks*, 3 Atk. 274; *Davies v. Cracraft*, 14 Ves. Jr. 143; *Re Bell's Estate*, L. R. 9 Eq. 172.

⁶*Re Union Bank*, 37 N. J. Eq. 420; *Wood v. Wood*, 4 Russ. 558; *Re Skerretts*, 2 Hog. 192; *Livingston v. Pettigrew*, 7 Lans. 405; *Newman v. Davenport*, 9 Baxt. 538.

⁷*Thurman v. Cherokee R. Co.* 56 Ga. 376; *Henderson v. Walker*, 55 Ga. 431; *Sloan v. Central Iowa R. Co.* 62 Iowa, 728; *Ohio & M. R. Co. v. Davis*, 23 Ind. 553; *Nichols v. Smith*, 115 Mass. 333; *Paige v. Smith*, 99 Mass. 395; *Fifield v. Northern R. Co.* 42 N. H. 225; *Klein v. Jewett*, 26 N. J. Eq. 474; *Cardot v. Barney*, 63 N. Y. 281; *Meara v. Holbrook*, 20 Ohio St. 137; *Potter v. Bunnell*, 20 Ohio St. 159; *Cleveland, C. & C. R. Co. v. Kearny*, 3 Ohio St. 201; *Ex parte Brown*, 15 S. C. 518; *Ex parte Johnson*, 19 S. C. 492; *Erwin v. Da-*

In such case the liability is official.¹

(8) And for any benefit or profit made from trust funds;²

(9) And for interest on funds improperly held,³ or interest negligently lost;⁴

(10) And for costs incurred in defending a suit,⁵ or prosecuting one;⁶

(11) And for rent when possession of premises is taken and held.⁷

(12) And for labor and materials furnished him;⁸

(13) And for violation of Act of Congress relating to receivers;⁹

(14) And for money paid out without order of court,¹⁰ or misappropriating the same;¹¹

(15) And for money collected under a void appointment;¹²

(16) And for illegal freights collected.¹³

venport, 9 Heisk. 44; *Lyman v. Central Vermont R. Co.* 59 Vt. 167; *Blumenthal v. Brainard*, 38 Vt. 402; *Hornsby v. Eddy*, 56 Fed. Rep. 461; *Missouri P. R. Co. v. Texas P. R. Co.* 30 Fed. Rep. 167; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 26 Fed. Rep. 12. But see *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 80 Fed. Rep. 344; *Dryden v. Stewart*, 2 Macq. H. L. 80. ¹*McNulta v. Lockridge*, 187 Ill. 270, 141 U. S. 327, 85 L. ed. 796; *McNulta v. Ensch*, 184 Ill. 46; *Combs v. Smith*, 78 Mo. 32; *Bonner v. Mayfield*, 82 Tex. 284; *Texas & P. R. Co. v. Geiger*, 79 Tex. 18.

²*Hooper v. Winston*, 24 Ill. 353; *Battaille v. Fisher*, 36 Miss. 321; *Adair Co. v. Ownby*, 75 Mo. 282; *Re Com. F. Ins. Co.* 82 Hun, 78; *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Manning v. Manning*, 1 Johns. Ch. 527; *Hinckley v. Gilman, C. & S. R. Co.* 100 U. S. 153, 25 L. ed. 591; *Potts v. Leighton*, 15 Ves. Jr. 273; *Baldwin v. Crawford*, 2 Chamb. Ch. (Ont.) 9.

³*Re Carter*, 3 Paige, 146; *Fletcher v. Dodd*, 1 Ves. Jr. 85; *Re Seaman*, 2 Paige, 409.

⁴*Syracuse Sav. Bank v. Hess*, 23 N. Y. Week. Dig. 280.

⁵*Locke v. Covert*, 42 Hun, 484.

⁶*Dudgeon v. Bowen*, Hayes & J. 717; *Bourdon v. Martin*, 74 Hun, 246; *Camp v. Niagara Bank*, 2 Paige, 288; *Com. v. Franklin Ins. Co.* 115 Mass. 278; *Wells v. Higgins*, 132 N. Y. 458.

⁷*Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197; *Woodruff v. Erie R. Co.* 98 N. Y. 609; *People v. Universal L. Ins. Co.* 80 Hun, 142; *Downs v. Allen*, 10 Lea, 652; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 682.

⁸See *Railway Receivers; Kneeland v. Bass Foundry Mach. Works*, 140 U. S. 592, 35 L. ed. 543; *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 34 L. ed. 879; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488; *Miltenerberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 289, 27 L. ed. 119; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Missouri P. R. Co. v. Texas & P. R. Co.* 41 Fed. Rep. 819.

⁹See Act of March 3, 1887, § 2, 25 Stat. at. L. 436.

¹⁰*Willis v. Sharp*, 124 N. Y. 406.

¹¹*Com. v. Eagle F. Ins. Co.* 14 Allen, 344.

¹²*Johnson v. Powers*, 21 Neb. 292.

¹³*Cutting v. Florida R. & Nav. Co.* 48 Fed. Rep. 743.

(b) WHEN NOT LIABLE.

In general the receiver will not be liable: (1) For the covenants and contracts of the person or corporation over whose property he is appointed.¹

(2) Nor for a loss occurring through no fault of his.²

(3) Nor is he liable when he has distributed the funds in his hands pursuant to the orders of the court, and has been discharged.³

(4) Nor for injuries on a railroad occurring prior to the appointment,⁴ and in some states for injuries during his management except where he is personally negligent,⁵ or where he is a foreign receiver operating a railroad by contract,⁶ or assumes the obligations of a lessee company. He is not liable where by statute the company is made liable,⁷ or where by its contract as lessee it alone is liable.⁸

(5) Nor is he liable for the contracts of the person or corporation over which he is appointed when not adopted by him,⁹ or

¹*Gaither v. Stockbridge*, 17 Md. 222; *Com. v. Franklin Ins. Co.* 115 Mass. 278.

²*Powers v. Loughridge*, 38 N. J. Eq. 396; *Re Union Bank*, 37 N. J. Eq. 420, s.c. sub nom. *Sandford v. Clarke*, 38 N. J. Eq. 265; *Knight v. Plymouth*, 3 Atk. 480.

³*Keene v. Gaehle*, 56 Md. 343; *Texas & P. R. Co. v. Comstock*, 38 Tex. 537; *Boggs v. Brown*, 82 Tex. 41; *Texas & P. R. Co. v. Adams*, 78 Tex. 372; *Brown v. Gay*, 76 Tex. 444; *Davis v. Duncan*, 19 Fed. Rep. 477; *Farmers' Loan & T. Co. v. Central Railroad*, 7 Fed. Rep. 537.

⁴*Holcomb v. Johnson*, 27 Minn. 353; *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480; *Pennsylvania Finance Co. v. Charleston, C. & O. R. Co.* 46 Fed. Rep. 508.

⁵*Cardot v. Barney*, 63 N. Y. 281; *Metz v. Buffalo, C. & P. R. Co.* 58 N. Y. 61. But see *Camp v. Barney*, 6 Thomp. & C. 622, 4 Hun, 373.

⁶*Frank v. New York, L. E. & W. R. Co.* 123 N. Y. 197; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Kain v. Smith*, 80 N. Y. 458; *Fuller v. Jewett*, 80 N.

Y. 46; *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 35 L. ed. 1025; *American File Co. v. Garrett*, 110 U. S. 288, 28 L. ed. 149; *Glenny v. Langdon*, 98 U. S. 20, 25 L. ed. 43; *Fidelity Safe Deposit & T. Co. v. Armstrong*, 35 Fed. Rep. 567; *Re Oak Hills Colliery Co. L. R.* 21 Ch. Div. 332.

⁷*Ohio & M. R. Co. v. Russell*, 115 Ill. 52; *Louisville N. A. & C. R. Co. v. Cauble*, 46 Ind. 277; *McKinney v. Ohio & M. R. Co.* 22 Ind. 99; *Ohio & M. R. Co. v. Fitch*, 20 Ind. 498. *Contra*, *Brockert v. Central Iowa R. Co.* 82 Iowa, 369. Cf. *Kansas P. R. Co. v. Wood*, 24 Kan. 619; *Texas & P. R. Co. v. Collins*, 84 Tex. 121; *Yoakum v. Selph*, 83 Tex. 607; *Turner v. Cross*, 83 Tex. 218, 15 L. R. A. 262.

⁸*Powell v. Dayton, S. & G. R. R. Co.* 13 Or. 83.

⁹*Brown v. Warner*, 78 Tex. 543, 11 L. R. A. 394; *Southern Exp. Co. v. Western N. C. R. Co.* 99 U. S. 191, 25 L. ed. 319; *Central Trust Co. v. Marietta & G. R. Co.* 51 Fed. Rep. 15, 16 L. R. A. 90.

contracts personal to such person or corporation,¹ or personally on his official contracts,² or contracts of a predecessor.³

(6) Nor for acts done pursuant to the orders of court.⁴

(7) Nor for speculative profits where he accounts for the proceeds of property.⁵

(8) Nor for money expended in good faith and for the best interests of the estate.⁶

(9) Nor for attorney's fees for services rendered to the corporation after his appointment.⁷

§ 110. Must obey orders of court.

A receiver cannot, without an order of court authorizing him so to do, turn over to a firm creditor specific funds of an estate, a secured note not inventoried, in payment of debts due by the estate to such transferee, and a foreclosure by such transferee of the deed of trust and sale thereunder conveys no title.⁸ If a receiver departs from the line of duty marked out for him by the decree and a loss occurs by reason thereof, he must bear such loss, although his action was under advice of counsel;⁹ and where he is ordered to loan a trust fund, and take bonds and trust deed in his own name, at six per cent interest, the principal to become due on default of two payments of interest he must be held liable for the loss of an investment in which he took notes instead of bonds at eight per cent, and failed to enforce the trust deed after default in two payments of interest.¹⁰ Where a receiver of

¹*Brown v. Warner*, 78 Tex. 548, 11 L. R. A. 394.

²*Lehigh Coal & Nav. Co. v. Central R. Co.* 41 N. J. Eq. 167.

³*Lehigh Coal & Nav. Co. v. Central R. Co.* 38 N. J. Eq. 175.

⁴*Holcomb v. Johnson*, 27 Minn. 358; *Cory v. Long*, 12 Abb. Pr. N. S. 427.

⁵*Demain v. Cassidy*, 55 Miss. 820.

⁶*Powers v. Loughridge*, 88 N. J. Eq. 396; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023.

⁷*Barnes v. Newcomb*, 89 N. Y. 108.

⁸*Hoopes v. Almstedt*, 13 Mo. App. 270, affirmed on other grounds in 88 Mo. 473. In general no discretion is allowed the receiver as to the applica-

tion or disposition of the funds; but he holds them subject to the order of court, and to be paid to whom the court shall adjudge. Cf. *Hooper v. Winston*, 24 Ill. 853; *Johnson v. Gunter*, 6 Bush. 534; *Blunt v. Clitherow*, 6 Ves. Jr. 799.

⁹*McCay v. Black*, 14 Phila. 635. It is not *mala fides* in the receiver but he is responsible notwithstanding.

¹⁰*Carr v. Morris*, 85 Va. 21. This too though no bad faith is shown; trustees of all kinds investing money in an unauthorized security are responsible for any future loss traceable to their error.

an insolvent estate appointed upon the removal of an executor pays out money without an order of court upon judgments obtained by creditors of the estate who have no priority over other creditors he is responsible therefor.¹ As a general rule it may be stated that where the court has ordered the receiver to do a thing in a particular way he has no discretion and if by reason of unforeseen circumstances it becomes difficult or impossible he must apply to the court for further directions.

§ 111. Liability for use of property, money, etc., contempt.

As we have seen, the receiver is required to scrupulously care for the property placed in his charge, and like all trustees he is not permitted to use the funds for his own private purposes. Thus where a receiver did not keep the receivership funds separate, but mingled them with his own moneys in the bank where he kept his account, in his own name, and drew out and used large sums of money from time to time by loaning the same to his friends, and otherwise, he was required to pay simple interest on the funds so used with annual rests.² Being an officer of court the receiver is liable for contempt in misappropriating money even under the belief that he has a right so to do as a compensation for his services, even though he has no intention of wrong doing; the matter of contempt not depending on the intention.³ Where two receivers were appointed to close up the affairs of a corporation and one of them illegally appropriated the corporation funds in his hands, using them for his own profit, and the other receiver negligently permitted such illegal appropriation they will be jointly liable for the balance found to be due from them with interest.⁴ He has no right to deposit the trust funds with his

¹ *Willis v. Sharp*, 124 N. Y. 406, modifying 58 Hun, 608.

A temporary receiver is not liable as such on a contract for the employment of a truckman; where he has not been authorized to make such contract. *Meyer v. Lezow*, 1 App. Div. 116.

² *Utica Ins. Co. v. Lynch*, 11 Paige, 520. A receiver in possession of slaves

was held bound to make them profitable, and if they were used about his private business he was liable for their reasonable hire. *Bataille v. Fisher*, 36 Miss. 321. Cf. *Hinckley v. Gilman, C. & S. R. Co.* 100 U. S. 153, 25 L. ed. 591.

³ *Curtwright's case*, 114 Mass. 230.

⁴ *Com. v. Eagle F. Ins. Co.* 14 Allen, 344.

own money — mix them with his own — and if he does so and the bank fails, he must account therefor.¹ Taking the receivership funds and depositing them to his private credit renders the receiver liable for interest.*

Upon the question of the power of the court to commit and punish for contempt it is understood to be inherent in courts of chancery and is an essential to the execution of their powers and to the maintenance of their authority.³ There is no class of cases in which the exercise of this power is more familiar than in the case of officers of courts,⁴ and receivers are clearly within the purview of the doctrine.⁵ The application is made in the original cause in which the receiver is appointed, but after the application is granted and the attachment is issued, the proceedings are distinct and are criminal in their nature,⁶ and are wholly independent of the fact that the offense might be punished by indictment,⁷ and the offense depends not upon the intention but the act. It is also a well settled principle of chancery practice that a person in contempt for disobedience to the authority of court is not

¹ *Wren v. Kirton*, 11 Ves. Jr. 377; *Mansey v. Banner*, 4 Madd. 416; *Salway v. Salway*, 2 Russ. & M. 215; *White v. Baugh*, 2 Bligh N. S. 181.

A bank in which a receiver kept his accounts was authorized to make sale of receiver's certificates, and did so, but after the order had been revoked, deposited the proceeds consisting of checks, drafts, etc. to the credit of the receiver, such deposits must be held to have come into the receiver's hands within the rule which makes the receipt of the proceeds by the receiver a condition precedent to the validity of the certificates, although the bank was never in a condition to pay any considerable portion of the deposits to the receiver. *Alabama Iron & O. Co. v. Anniston Loan & R. Co.* 57 Fed. Rep. 25. In such a case the fact that the receiver on learning of the insolvency of the bank took from it and from the president personally certain

collateral securities to protect his deposits was not a repudiation of the sale but rather a fresh ratification.

² *Hinckley v. Gilman, C. & S. R. Co.* 100 U. S. 158, 25 L. ed. 591.

³ *Cartwright's Case*, 114 Mass. 230; *United States v. Hudson*, 11 U. S. 7 Cranch, 82, 8 L. ed. 259.

⁴ *United States v. Mann*, 2 Brock. 9; *Re Pitman*, 1 Curt. 186; *Yates v. Lansing*, 9 Johns. 395.

⁵ *Davis v. Gray*, 88 U. S. 16 Wall. 208, 21 L. ed. 447; *Hills v. Parker*, 111 Mass. 508.

⁶ *Folger v. Hoagland*, 5 Johns. 235; *Ex parte Kearney*, 20 U. S. 7 Wheat. 38, 5 L. ed. 391; *Durant v. Washington County Supers.* 1 Woolw. 377; *Winslow v. Noyson*, 118 Mass. 411; *McDermott v. Clary*, 107 Mass. 501.

⁷ *Ray v. Osmulston*, 2 Strange, 1107; *Spalding v. People*, 7 Hill, 801, 10 Paige, 284; *State v. Woodfin*, 5 Ired. L. 199; *State v. Williams*, 2 Speers, 26.

entitled to be heard upon any motion or other proceeding in the cause until he purges himself of the contempt.¹

§ 112. As common carrier.

While a court of chancery appointing a receiver will throw around him its shield of protection in all necessary cases, yet it cannot be recognized as a defense to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by him as receiver, that he is an officer of court acting under a decree of a court of chancery. The obligations and duties which the receiver assumes are, in all cases, and like all other persons, to be measured by the nature and character of the business which he engages in. Thus it cannot be contended that the receiver who is the mere custodian of property, answerable only for its safe keeping and due return when called upon for that purpose, occupies a similar position with like responsibilities to the receiver, who by virtue of his official position is placed in possession of, and is charged with the management and control of a railway where he by virtue of his undertaking assumes the functions of a common carrier, and where in his dealings he is constantly brought in contact with the public. In the latter case his responsibilities are infinitely increased. The very nature of the business carries with it extraordinary duties and corresponding liabilities, and hence it is that courts are becoming more disposed to charge this class of receivers with a greater degree of responsibility, and recognize in the public, and those dealing with them, greater privileges and greater facilities for relief, not only in matters purely *ex contractu* but more especially in matters *ex delicto*.²

§ 113. As common carrier for personal injuries.

Where the management of a railroad, or other concern of a quasi public nature, has passed into the hands of a receiver, and he is in charge and is operating the same in his official capacity, and a passenger or an employee is injured through the fault of the employees of the receiver, the liability is in all respects governed by the principles that would be applicable to the same action were the proceeding between the person so injured and

¹ *Wartman v. Wartman*, Taney, 362.

² *Blumenthal v. Brainard*, 88 Vt. 402; *Sprague v. Smith*, 29 Vt. 421.

the railroad company had no receiver been appointed. The only difference between the two proceedings being that in the former case it is somewhat in the nature of a proceeding *in rem*, and the damages recovered, if any, are chargeable to the property or fund in the hands of the receiver, and are payable from the funds subject to distribution on the final order of the court.' It was at

¹ *Kain v. Smith*, 80 N. Y. 458. The basis of this decision is the fact that the receiver as an officer of court has displaced the officers of the company who by the charter are authorized to manage its affairs, and under the direction of the court has the sole control and management of the property and effects of the company, and for the time being is in the exercise of the franchises of the company as its chief executive, and is responsible to the court for his conduct in all these things. Cf. *Klein v. Jewett*, 26 N. J. Eq. 474; *Fuller v. Jewett*, 80 N. Y. 46; *Morse v. Brainard*, 41 Vt. 551; *Cowdrey v. Galveston, H. & H. R. Co.* 98 U. S. 353, 25 L. ed. 950; *Rochester v. Bronson*, 41 How. Pr. 78; *Meara v. Holbrook*, 20 Ohio St. 137; *Davenport v. Alabama & C. R. Co.* 2 Woods, 519; *Jordan v. Wells*, 3 Woods, 527; *Sloan v. Central Iowa R. Co.* 62 Iowa, 728; *Little v. Dusenberry*, 46 N. J. L. 614; *Blumenthal v. Brainard*, 38 Vt. 402; *Paige v. Smith*, 99 Mass. 395; *Camp v. Barney*, 4 Hun, 518; *Missouri P. R. Co. v. Texas P. R. Co.* 30 Fed. Rep. 167, 169; *Combs v. Smith*, 78 Mo. 32. (This was a suit for a tort committed by the company before the appointment of the receiver.) *Hornsbey v. Eddy*, 56 Fed. Rep. 461; *Gibbes v. Greenville & O. R. Co.* 15 S. C. 518; *Texas P. R. Co. v. Geizer*, 79 Tex. 18; *Texas P. R. Co. v. Johnson*, 76 Tex. 421; *Graham v. Chapman*, 83 N. Y. S. R. 349; (lack of funds is no defense); *Newell v. Smith*, 49 Vt. 255; *Sprague v. Smith*, 29 Vt. 421; *Lyman v. Central Vermont R. Co.* 59 Vt. 167; *Ballou v.*

Farnum, 9 Allen, 47; *Ex parte Johnson*, 19 S. C. 492; *Barter v. Wheeler*, 49 N. H. 9; *Ex parte Brown*, 15 S. C. 518; *Lamphear v. Buckingham*, 38 Conn. 287; *Kinney v. Crocker*, 18 Wis. 74; *Allen v. Central R. Co.* 42 Iowa, 688. But see *Henderson v. Walker*, 55 Ga. 481; *Thurman v. Cherokee R. Co.* 51 Ga. 376. These two cases have been supposed to be at variance with the general current of decisions, but a careful analysis will show that they are not. The case of *Cardot v. Barney*, 63 N. Y. 281, is apparently in conflict with *Graham v. Chapman*, 83 N. Y. S. R. 349; *Durkin v. Sharp*, 88 N. Y. 225, and *Fuller v. Jewett*, 80 N. Y. 46 of the same state.

In *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 445, 21 L. ed. 675, it appeared that a railroad was operated on the joint account of a receiver of part of it and lessees of the remaining part, and that the tickets were issued by the railroad company, and an injury occurred to a passenger, it was held that the operation of the road by the lessees did not change the relation of the original company to the public, and the company was responsible unless it appeared that the possession of the receiver was exclusive, and the control of the employees exclusively in him. And when the road was run on the joint account of the lessees and receiver, the servants being employed by them jointly, both were liable for the injury complained of together with the original company.

In *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672, suit was brought

one time contended that by reason of the receiver's official position an action could not be maintained against him for either his own negligence or that of his employees,¹ but this contention is no longer tenable either in this country or in England.² The lia-

against a receiver for personal injuries received by the plaintiff while a passenger on a railroad operated by the receiver. It was held on the authority of *Cowdrey v. Galveston, H. & H. R. Co.* 93 U. S. 352, 23 L. ed. 950, that the receiver was liable by reason of his assuming the duties of a common carrier, and that the receiver stood on precisely the same footing so far as damages for the injury were concerned as for any of the expenses incurred in the execution of the trust, and they must be adjusted and satisfied in the same way.

¹ This principle of law applicable to agents of the public in the discharge of their legitimate functions, is based upon the following authorities (with others):

Sussex County Chosen Freeholders v. Strader, 18 N. J. L. 108; *Cooley v. Essex Chosen Freeholders*, 27 N. J. L. 415; *Livermore v. Camden County Chosen Freeholders*, 29 N. J. L. 245; *Pray v. Jersey City*, 32 N. J. L. 394; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19. In *Hill v. Boston*, 122 Mass. 344, the whole subject is most exhaustively reviewed from the standpoint of both English and American cases by Chief Justice Shaw. The same principle of nonliability for injuries growing out of negligence on the part of his agents, was sought to be extended to receivers of railroads on the ground that they were public agents and engaged in the performance of public duties in the case of *Little v. Dusenberry*, 46 N. J. L. 614, but Mr. Justice Scudder, in a thorough examination of the cases up to that time (1884) held that the principle

was inapplicable to receivers by reason of the difference existing between the functions of railroad receivers and public officers of towns, cities, etc., and that receivers were liable in their representative capacity in all respects to others for injuries, as the company would be if transacting its business in the usual way. Of course the payment of the judgment in all cases must remain subject to order and direction of the court, taking into consideration the funds subject to distribution and the respective rights and interests of all persons interested therein. Cf. *Sprague v. Smith*, 29 Vt. 421; *Fuller v. Jewett*, 80 N. Y. 46; *Kain v. Smith*, 80 N. Y. 458. But see *Cardot v. Barney*, 63 N. Y. 281.

² *Ruck v. Williams*, 3 Hurlst. & N. 308. In this case Pollock, C. B., applied the rule of negligence to commissioners charged with the performance of duties analogous to those of receivers, in the following language: "I see nothing in the character of the commissioners as a public body, or in the fact that they are discharging a public duty without any remuneration to exempt them from liability to compensate a person who has suffered by their carelessness, or want of due regard in the performance of their duty. They are entitled to reimburse themselves out of the funds over which they have control, and it would be hard indeed to throw on the plaintiff the loss which has been sustained rather than let it be paid out of the common fund which the commissioners have at their disposal."

Cf. *Fenton v. Dublin Steam Packet Co.* 8 Ad. & El. 835; *Quarman v.*

bility of the receiver extends to injuries received on a connecting line where through trains are used by the same employees, and through contracts are made for both lines,¹ but where the receiver operates one road as receiver and another as lessor, and an injury occurs on the latter, he is individually liable,² and not in his official capacity.

§ 114. As common carrier for damages.

The receiver of a railroad corporation in charge of and operating its road is liable for the loss of freight growing out of the negligence of his agents;³ and for negligence in the construction

Burnett, 6 Mees. & W. 509; *Dalyell v. Tyrer*, 1 El. Bl. & El. 906. The law in this country, as applied to receivers, is similar in its application. See authorities in preceding note. In Iowa, and some other states, the receiver is made liable by statute for injuries received by an employee, the receiver being included in "persons owning or operating railways" pursuant to §§ 1278 and 1807 of Iowa Code. *Sloan v. Central Iowa R. Co.* 62 Iowa, 728. In Texas, however, the receiver is not liable as "proprietor" for injuries resulting in the death of a person caused by the negligence of the receiver or his agents. *Dillingham v. Scales* (Tex. Civ. App.) 24 S. W. 975; *Turner v. Cross*, 88 Tex. 218, 15 L. R. A. 262; *Yoakum v. Selph*, 83 Tex. 607. In Tennessee the receiver of a delinquent railroad company, appointed by the governor under the provisions of a statute, was held to be a public agent and as such not liable for the wrongs or negligence of his employees, but only liable for his own wrongful delinquencies. *Hopkins v. Connel*, 2 Tenn. Ch. 323; *Erwin v. Davenport*, 9 Heisk. 44; Cf. *Cardot v. Barney*, 63 N. Y. 281; *Davenport v. Alabama & C. R. Co.* 2 Woods, 519; *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Lord Le*

Despencer, Cowp. 754; *Duncan v. Findlater*, 6 Clark & F. 894; *Mersey Docks & Harbor Trustees v. Gibbs*, L. R. 1 H. L. 111; *Henderson v. Walker*, 55 Ga. 481.

¹ *Howe v. Gibson*, 3 Tex. Civ. App. 268.

² *Kain v. Smith*, 80 N. Y. 458; reversing 11 Hun, 552. Cf. *Rogers v. Wheeler*, 43 N. Y. 598; *Sprague v. Smith*, 29 Vt. 421; *Baxter v. Wheeler*, 49 N. H. 9; *Blumenthal v. Brainard*, 38 Vt. 409; *Paige v. Smith*, 99 Mass. 395; *Nichols v. Smith*, 115 Mass. 382.

Where an injury results from the default or misconduct of a receiver, appointed by a court of equity, while acting under the color of the authority of the court, and there is no dispute as to the power of the court to make the order under which he claims to have acted, the court may, in its discretion, either take cognizance of the question of the receiver's liability and determine it, or permit the aggrieved party to sue at law. But if the power of the court to make the order is disputed, the court has no choice; it must assume exclusive jurisdiction and inhibit the aggrieved person from seeking redress against the receiver in any other tribunal. *Klein v. Jewett*, 26 N. J. Eq. 474.

³ *Melendy v. Barbour*, 78 Va. 544.

of a railroad crossing;¹ and for the negligent destruction of property by fire;² and for his omission to make the necessary repairs to engines rented and used by him;³ and for injury to property delivered to him, as a common carrier, for shipment.⁴ And where goods are committed to him for sale, and through negligence or bad faith he fails to realize the full value, he will be liable for the real value but not the speculative value.⁵ He is responsible for the value of property which by diligence would have come to his possession, but has become lost by his omission to act;⁶ but he is not liable to pay from the net earnings in his hands, as against the prior equity of bondholders, for the loss of freight while in transit, even when such loss occurred within six months prior to the appointment;⁷ nor for personal injuries, unless it is so provided in the order of appointment;⁸ nor from the earnings, or proceeds of sale, in preference to the first mortgage bondholders,⁹ though probably the great weight of authority is to the effect that damages for personal injuries are payable from the current receipts.¹⁰

¹ *Roxbury v. Central Vermont R. Co.* 60 Vt. 121.

² *Peoples v. Yoakum* (Tex. Civ. App.) 25 S.W. 1001.

³ *Turner v. Indianapolis, B. & W. R. Co.* 8 Bls. 527.

⁴ *Yoakum v. Dunn*, 1 Tex. Civ. App. 524 (see act of 1889, amending act of 1887, and its application to receiver's liability).

⁵ *Demain v. Cassidy*, 55 Miss. 320.

⁶ *Clapp v. Clapp*, 49 Hun, 195.

⁷ *Easton v. Houston & T. C. R. Co.* 38 Fed. Rep. 12; *Pennsylvania Finance Co. v. Charleston, C. & C. R. Co.* 46 Fed. Rep. 508; *Ex parte Brown*, 15 S. C. 523.

⁸ *Davenport v. Alabama & C. R. Co.* 2 Woods, 519.

⁹ *Davenport v. Alabama & C. R. Co.* *supra*. But see *contra*, *Coudrey v. Galveston, H. & H. R. Co.* 93 U. S. 352, 23 L. ed. 950.

¹⁰ *Hale v. Frost*, 99 U. S. 389, 25 L. ed. 419; *Fosdick v. Schall*, 99 U. S.

235, 25 L. ed. 339; *Barton v. Barbour*, 104 U. S. 136, 26 L. ed. 677; *Kain v. Smith*, 80 N. Y. 458; *Ryan v. Hays*, 62 Tex. 42; *Klein v. Jewett*, 26 N. J. Eq. 474; *Morse v. Brainard*, 41 Vt. 551; *Coudrey v. Galveston, H. & H. R. Co.* 93 U. S. 352, 23 L. ed. 950. The grounds upon which these decisions are based are in the main (1) That this class of claims stand precisely upon the same footing as other expenses of the receivership, and should be paid from the same source. (2) That every mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. Mr. Chief Justice Waite, in *Fosdick v. Schall*, *supra*, said: "The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors he need grant none. But if he calls upon a court of chancery to

§ 115. Corporation in hands of receiver not liable.

Where the property and effects of a railroad corporation are in the hands of a receiver, and he in his official capacity is operating the road, the corporation is not liable for the torts of the receiver or of his agents and employees. Having no control of the property, it is apparent no liability can be imputed to it for injuries received while the road is operated by another.¹

put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mould his order that while favoring one, injustice is not done to another."

A receiver of a railway is not the "proprietor, owner, charterer, or hirer" of the railway, within Tex. Rev. Stat. art. 2899, and was not liable under that article prior to the amendment thereof by Tex. Act, April 11, 1892, to one run over by an engine on such railway. *Campbell v. Davis* (Tex. Civ. App.) 23 S. W. 244; *Turner v. Cross*, 83 Tex. 218, 15 L. R. A. 262.

A receiver cannot be held liable in Texas for damages resulting in death. *Texas & P. R. Co. v. Thedens* (Tex. Civ. App.) 21 S. W. 132; *Yoakum v. Selph*, 83 Tex. 607; *Texas & P. R. Co. v. Collins*, 84 Tex. 121.

A receiver of a railway company is liable for personal injuries resulting from a defect in the road, where he is not sought to be charged with any personal liability, whether the defect existed when the railway came into his hands, or whether he had been in charge of the road a sufficient time to enable him to repair it. *Bonner v. Mayfield*, 82 Tex. 284.

No recovery can be had under the statute, either against the receivers themselves or the railway company, for personal injuries sustained by an employee while a railway company's property is in the hands of receivers, when it does not appear that the receiver was personally and immediately guilty of neglect. *Texas & P. R. Co. v. Bledsoe*, 2 Tex. Civ. App. 88 (see sub. 1 and 2, art. 2899, Tex. Rev. Stat.).

In general the measure of the receiver's liability is the liability of the person or corporation whose property he is administering. *Whitehouse v. Fellowes*, 10 C. B. N. S. 765; *Dalton v. Atlantic, M. & O. R. R. Co.* 4 Hughes, 180; *Mersey Dock Trustees v. Gibbs*, 11 H. L. Cas. 686.

When a corporation is in the hands of a receiver who has full possession of its property and entire charge of its affairs, it is not liable for crimes and misdemeanors committed by the agents of the receiver. *State v. Wabash R. Co.* 115 Ind. 466; *Ohio & M. R. Co. v. Davis*, 23 Ind. 553; *Bell v. Indianapolis, C. & L. R. Co.* 53 Ind. 57.

¹ *Meara v. Holbrook*, 20 Ohio St. 187; *Klein v. Jewett*, 26 N. J. Eq. 474; *Jordan v. Wells*, 3 Woods, 527; *Davis v. Duncan*, 19 Fed. Rep. 477; *Ohio M. R. Co. v. Davis*, 23 Ind. 560; *Bell v. Indianapolis, C. & L. R. Co.* 53 Ind. 57; *Metz v. Buffalo, C. & P. R. Co.* 58 N. Y. 61; *Rogers v. Mobile, etc. R. Co.* 17 Cent. L. J. 290 (Tenn. 1883).

Where a personal injury is received while the road is in the hands of a re-

A railroad company in the hands of a receiver is not liable for an obstruction in the highway which has been erected and is maintained by a receiver,¹ and is not liable for the death of an employee caused by the negligence of the receiver.² It has been held that a person at whose instance a receiver is appointed should see that he performs his duties, and any loss which he might have prevented by proper diligence must, as between him and other litigants, be borne by him.³

§ 116. Liability for use of receivership funds.

Where the receiver realizes on money invested by him which is not authorized by the court, he is responsible therefor,⁴ and in all cases he must account for the profit on funds held by him,⁵ and when he deposits the money belonging to his trust to his private account and uses it he is chargeable with interest.⁶ All classes of trustees having money in their hands belonging to a trust estate are bound to keep the trust funds separate and dis-

ceiver, and subsequently it is turned over by the receiver to the corporation, and a suit for the injury is brought against the corporation, and it appears by the evidence that during the time of the receivership the earnings of the road are more than the amount of the claim, but were applied toward betterments of the road, and the road in its improved condition turned over to the corporation, and the injury complained of is such that a recovery could have been had against the receiver, had he still remained such, the plaintiff is entitled to recover, even if the court prior to the receiver's discharge ordered all claimants to intervene within a fixed time. *Texas & P. R. Co. v. Boyd*, 6 Tex. Civ. App. 205; *Texas T. R. Co. v. Johnson*, 86 Tex. 421. And if the liabilities of the receiver for unadjusted claims exceed the amounts expended for betterments, it must be pleaded in order to constitute a defense. *Texas & P. R. Co. v. Bailey*, 83 Tex. 19.

¹*State v. Minneapolis & St. L. R. Co.* 88 Iowa, 589.

²*Texas & P. R. Co. v. Collins*, 84 Tex. 121; *Memphis & L. R. R. Co. v. Stringfellow*, 44 Ark. 322; *Turner v. Hannibal & St. J. R. Co.* 74 Mo. 602; *Ohio & M. R. Co. v. Anderson*, 10 Ill. App. 318.

³*Downs v. Allen*, 10 Lea, 652; *Terrill v. Ingersoll*, 10 Lea, 77.

But in Iowa where no fraud is shown against the plaintiff, he is not liable for damages sustained by property while in the hands of a receiver.

Kaiser v. Kellar, 21 Iowa, 95.

A railroad company is not liable for the negligence of the servant of a receiver.

Ohio & M. R. Co. v. Davis, 28 Ind. 553; *Metz v. Buffalo, C. & P. R. Co.* 58 N. Y. 61. Cf. *Stanton v. Alabama & C. R. Co.* 31 Fed. Rep. 585.

⁴*Baldwin v. Crawford*, 2 Chamb. Ch. (Ont.) 9.

⁵*Adair County v. Owenby*, 75 Mo. 282.

⁶*Re Com. F. Ins. Co.* 32 Hun, 78.

tinct from moneys of their own; and if deposited in bank for safe keeping the money should be deposited to the credit of a separate account in their names as trustees so that the funds can be at all times traced and identified; but if this be not done and the court can see that by mingling of the trust funds with their own the trustees have derived any benefit from their use, they are chargeable with interest, simple or compound, as the facts may require.¹ Where the receiver is ordered to invest the funds in his hands in a certain way and he does not do so, he is liable for interest. It may be stated as a general proposition that where a receiver holds money in his hands improperly he will be chargeable with interest,² and where he makes interest he is liable for interest.³

¹*Manning v. Manning*, 1 Johns. Ch. 527; *Ratcliffe v. Graves*, 1 Vern. 196; *Newton v. Bennet*, 1 Bro. C. C. 359; *Piety v. Stace*, 4 Ves. Jr. 620; *Schieffelin v. Stewart*, 1 Johns. Ch. 618; *Minusc v. Coz*, 5 Johns. Ch. 447; *Mumford v. Murray*, 6 Johns. Ch. 17; *Kellett v. Rathbun*, 4 Paige, 110; *Ogilvie v. Ogilvie*, 1 Bradf. 356; *Duffy v. Duncan*, 32 Barb. 598, affirmed in 85 N. Y. 191; *Lansing v. Lansing*, 45 Barb. 182; *Re Com. F. Ins. Co.* 32 Hun, 78.

In this case the receiver deposited the receivership moneys with his own funds, and checked them out from time to time for his own purposes he was charged with interest; but he cannot be charged with interest simply because he deposits them with his own funds in the bank where the evidence fails to show that he has used any part of the funds.

Radford v. Folsom, 55 Iowa, 276; *Hicks v. Hicks*, 8 Atk. 274.

A special receiver appointed to collect a surplus arising from a sale under a deed of trust and return it to court at the next term, who received the same in confederate treasury notes at the beginning of the war, and in good faith placed them in a responsi-

ble bank to the general account of a firm of which he was a member, in which numerous fiduciary deposits were kept, is not liable therefor where no subsequent term was held, and the bank failed as a result of the war, and the money was lost with it. *Barton v. Ridgeway*, 92 Va. 163.

²*Harman v. Foster*, 1 Hog. 318; *Fetnam v. Kirby*, 4 Ir. Eq. 320.

A receiver is not, as a matter of course, chargeable with interest in the absence of special circumstances. *Crawford v. Fickey* (W. Va.) 28 S. E. 662.

³*Potts v. Leighton*, 15 Ves. Jr. 273; *Lonsdale v. Church*, 3 Brace, 41; ——— *v. Jolland*, 8 Ves. Jr. 72; *Fletcher v. Dodd*, 1 Ves. Jr. 85; *Harrison v. Boydell*, 6 Sim. 211; *Shaw v. Rhodes*, 2 Russ. 539.

But he is not liable for interest if he does not treat the trust funds as his own. *Adair County v. Owenby*, 75 Mo. 282.

An order directing receivers to pay interest on certain bonds, "after meeting such other obligations as they have been directed to discharge by the former orders of this court," does not authorize the payment of such in-

§ 117. For default of another.

A receiver of a corporation who employs another to look after and care for property, in the absence of an express agreement to the contrary, is individually liable for the latter's services,¹ but where he employs an attorney to collect money, which is collected by such attorney and not turned over to the receiver, he will not be liable to the estate for such loss where it appears that the employment of an attorney was necessary, and the attorney employed was in good standing.²

terest until the debts expressly directed to be paid by the former orders have been paid.

Central Trust Co. v. Wabash, St. L. & P. R. Co. 38 Fed. Rep. 63.

¹*Rogers v. Wendell*, 54 Hun, 540. This was an action brought by an employee of the receiver whose duty it was under his contract to take charge of the receivership property and make certain disbursements on account of the property. In the course of his employment he made weekly reports to the receiver, furnished material, looked after the property generally. The receiver died without having paid the plaintiff his salary of \$400, and \$38 disbursed, and suit was instituted against the estate for these amounts. On the trial of the case the court refused judgment on the ground that the receiver did not assume a personal liability. The case was reversed in the upper court upon the authority of *Schmitter v. Simon*, 101 N. Y. 557; *Willis v. Sharp*, 118 N. Y. 591, 4 L. R. A. 493 (Executors and Administrators); *Austin v. Munro*, 47 N. Y. 360, which were cases holding executors and administrators personally liable on their contract. See also *Davis v. Storer*, 16 Abb. Pr. N. S. 225, where it was held that an agent employed by a receiver in the execution of a trust must look to the person employing him individually, for his pay, and the

estate was not bound, but that if there was an express agreement that the compensation was to be made out of the estate the claim might be an equitable set-off against a claim of the estate. The same principle was announced in *Noyes v. Blakeman*, 6 N. Y. 580; *Mygatt v. Wilcox*, 45 N. Y. 309; *Bowman v. Tallman*, 2 Robt. 385; *People v. Universal L. Ins. Co.* 30 Hun, 142; *Kedian v. Hoyt*, 33 Hun, 145 (trustee); *Ryan v. Rand*, 20 Abb. N. C. 314; *Patton v. Royal Baking Powder Co.* 114 N. Y. 4. A receiver has no power to contract a debt chargeable against the fund, and while a court may allow expenses by a receiver for the preservation of the property, it is the order of court and not the act of the receiver which creates the charge and upon which its validity depends. *Vilas v. Page*, 106 N. Y. 451.

²In *Re Union Bank*, 37 N. J. Eq. 420, the receiver was not permitted to charge the fund with the expense of clerks when services were unnecessary, nor with the expense of a daily newspaper, nor for fees of counsel to resist applications to the court which the receiver ought not to have opposed, but he was allowed for moneys collected and misappropriated by an attorney whom he employed in the business of the trust in which it was necessary for him to act by an attorney-at-law, such attorney being in

§ 118. For supplies, labor, etc.

As has been seen elsewhere the receiver in a foreclosure proceeding is authorized to purchase on credit the necessary supplies, and such indebtedness is payable out of the net earnings, and if they are insufficient then it may be a charge upon the funds realized on a sale of the mortgage premises.¹ He is not personally liable, however, for services rendered by employees in charge of receivership property.² Where an employee of a receiver of a railroad company is injured in the line of his duty and without his apparent fault he may recover his wages for the time during which he is disabled.³ Where materials are furnished to a receiver the proper court to present a claim therefor is the court appointing the receiver and not the court of another state where the receivership has been extended over leased lines by ancillary proceedings.⁴ The employees of a receiver alleging a grievance against him may be heard by the court upon making proper application, and if the court shall be of opinion that further investigation is demanded he may require the receiver to answer and hear evidence upon the issue made, but the court will not reverse a decision of the receiver in reducing the wages of his employees where it involves an extensive investigation.⁵

good standing and no negligence appearing on the part of the receiver.

See § 118, note 2; § 120.

¹*Kneeland v. Bass Foundry & Mach. Works*, 140 U. S. 592, 35 L. ed. 543; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379; *Mittenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 289, 27 L. ed. 119; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895.

²*Rogers v. Wendell*, 54 Hun, 540.

³*Missouri P. R. Co. v. Texas & P. R. Co.* 41 Fed. Rep. 319.

⁴*Clyde v. Richmond & D. R. Co.* 56 Fed. Rep. 539.

⁵*Continental Trust Co. v. Toledo, St. L. & K. O. R. Co.* 59 Fed. Rep. 514.

See also *Railroad Receivers*.

As to the payment of claims from the proceeds of sale it is held in *Kne-*

land v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, that where the receiver is appointed at the instance of a general creditor, such creditor is not entitled as against the lien of the mortgage bondholders to a preference in payment from the proceeds of sale. But in *Kneeland v. Bass Foundry & Mach. Works*, 140 U. S. 592, 35 L. ed. 543, a claim was allowed for supplies furnished to a receiver, appointed on the application of a judgment creditor, and ordered to be paid from the proceeds of sale, where so far as the record showed that was the only fund available for its payment and where the supplies were necessary for the continued operation of the road, and had gone into the general property covered by the mortgage, which was sold at the foreclosure sale, upon the authority of *Fordick v.*

§ 119. For money deposited in bank.

A receiver having money in his hands has no right to part with the actual custody of such money by depositing it in a bank or otherwise, save at his own risk, without order of court and he must make good the loss.¹ While a receiver may keep money in a bank as a safe place of deposit, or he may use the bank as a means of transmitting money to distant places, and if in doing so he uses reasonable care and diligence he will not be held liable for loss in case of a failure of the bank,² and where the receivership money is already in a place of permanent custody and which is one of safety the receiver is not authorized in removing such deposit to a bank, or otherwise save at his own risk without an order directing him to do so from the court,³ but if a receiver in the exercise of sound business judgment deposits money in a bank of good credit in preference to taking the money with him to London to pass his accounts, and in the meantime the bank fails the receiver is not liable.⁴ But where he has the receivership money on deposit in a bank to his credit as receiver and withdraws such deposit and places it to his private account in another bank and declines to explain the transaction he is chargeable with interest,⁵ and if he places the fund with private bankers without security and it is loaned out on stock collaterals without his knowing to whom, or on what stock, or the interest to be received, he is chargeable with the interest he received.⁶

Schall, 99 U. S. 235, 25 L. ed. 339; *Miltenerberger v. Logansport, O. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 438; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Burnham v. Bowers*, 111 U. S. 776, 28 L. ed. 596.

¹*Ricks v. Broyles*, 78 Ga. 610; *State, Collins, v. Gooch*, 97 N. C. 186.

²*State, Collins, v. Gooch, supra*. He will not be authorized, however, in making a loan to the bank without security.

³*Ricks v. Broyles*, 78 Ga. 610; *Knight v. Plymouth*, 3 Atk. 480.

⁴*Routh v. Howell*, 3 Ves. Jr. 565.

Cf. Atlantic & N. C. R. Co. v. Cowles, 69 N. C. 59.

⁵*Hinckley v. Gilman, C. & S. R. Co.* 100 U. S. 153, 25 L. ed. 591.

⁶*Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 94. In this case the receiver acted in good faith and no money was lost.

A firm suspended and became insolvent and at the time of such suspension had on deposit with them from another firm a large amount of money to secure advances made to the latter from time to time. It was not understood that they were to keep on hand the same money deposited or any particular money or property, the

§ 120. For costs and expenses.

Where proceedings were instituted by a bank, and after its insolvency and the appointment of a receiver the latter carried on the proceedings, the defendant is entitled to his costs on the rendition of a judgment in his favor, to be paid from the fund in the receiver's hands,¹ but the court will not order paid expenses incurred in legal proceedings where such proceedings were not authorized by the court,² nor where the receiver contests a claim in bad faith, and where he voluntarily embarks in litigation without funds from which to pay the costs thereof he is guilty of bad faith and must pay such costs personally.³ Costs incurred for the benefit of a fund in the hands of a receiver will be paid from such fund,⁴ though an order of court authorizing the action has been held necessary.⁵ Where a judgment for costs has been rendered against a receiver he will not be ordered on motion to pay such costs from the funds in his hands, even upon a showing that he has paid other larger amounts, or recently had sufficient funds to pay the judgment. He is not bound to render the account to each individual creditor. Other creditors with suits pending or to be commenced have an equal claim upon the funds in the receiver's hands. Such a motion cannot be converted into a creditor's bill.⁶ Expenses for repairs are a charge on the funds in his

account being a debit and credit account, interest being allowed on one side and credited on the other. After the suspension and appointment of a receiver, the depository firm sought to compel the receiver to pay over the balance in his hands of said deposit on the ground that it was a special deposit. *Held*, that the receiver was not liable for the deposit as a special deposit; if a special deposit had been made and the same money had been found or property in which it had been wrongfully invested, or which had been wrongfully substituted for it then such money or property could have been followed into the hands of the receivers and recovered. *Butler v. Sprague*, 66 N. Y. 392. Cf. *Re Franklin Bank*, 1 Paige, 249; *Chap-*

man v. White, 6 N. Y. 412; *Cook v. Tullis*, 85 U. S. 18 Wall. 332, 21 L. ed. 933; *Clark v. Iselin*, 88 U. S. 21 Wall. 360, 23 L. ed. 568; *Van Alen v. American Nat. Bank*, 52 N. Y. 6.

¹*Camp v. Niagara Bank*, 2 Paige, 288.

²*Dudgeon v. Bowen*, Hayes & J. 717.

³*Bourdon v. Martin*, 74 Hun, 246.

A receiver of an estate cannot charge the heirs and legatees with the cost of an unsuccessful litigation over his accounts. *Henry v. Henry*, 103 Ala. 582.

⁴*Locke v. Covert*, 42 Hun, 484.

⁵*Swaby v. Dickon*, 5 Sim. 629; *Conyers v. Crosbie*, 6 Ir. Eq. 657; *Bristowe v. Needham*, 12 Phill. Ch. 190.

⁶*Devendorf v. Dickinson*, 21 How. Pr. 275.

hands, and so are salaries, including receiver's certificates, a charge upon mortgage property taking precedence to the mortgage.¹

§ 121. **For rents.**

Where a receiver as such takes possession of premises which were held as lessee by those whose estate he is administering and has paid rent therefor, according to the terms of the lease, from the time of his appointment for a considerable period thereafter, he becomes liable for the rent accruing thereafter, and it is not a defense that there is no privity of contract between himself and lessor. The title to the demised term passes to and becomes vested in the receiver and he is liable for the subsequently accruing rent.² This principle is based upon the fundamental doctrine applied to parties generally, that possession and use of property carries with it a corresponding liability to pay therefor according to the terms of the lease under which the property was held by the receiver's predecessor, during the time he occupies the demised property.³ But it by no means follows from this that he becomes liable for the entire unexpired portion of the term, for he is liable for such covenants only as are broken while privity of estate is continued, and it is at all times within his power to escape further liability by abandoning possession even if done for the express purpose of avoiding further payment for rent, and thereby destroy the privity of estate.⁴

A receiver will be liable for the rents collected by him although his bond was not approved until sometime afterwards,⁵ but he is not liable where he refuses to take possession of the leasehold

¹*Sterling v. Wynne*, Hayes & J. 817; *Ellis v. Vernon*, 4 Tex. Civ. App. 66. See § 117.

²*Wells v. Higgins*, 132 N. Y. 459; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197.

³*Frank v. New York, L. E. & W. R. Co. supra*. In such case the receiver occupies the premises and makes himself liable by reason of his privity of estate and not by any privity of contract, and by reason thereof

becomes liable to pay rent which is a covenant running with the land.

A service of notice upon the lessee in a forcible entry and detainer proceeding will be binding on a receiver of his property subsequently appointed in another suit. *Woodward v. Winehill* (Wash.) 44 Pac. 860.

⁴*Frank v. New York, L. E. & W. R. Co. supra*; *Childs v. Clark*, 3 Barb. Ch. 52; *Tate v. McCormick*, 23 Hun, 218; *Durand v. Curtis*, 57 N. Y. 7.

⁵*Western Canada & I. Co.* 8 Prec. Rep. (Ont.) 262.

premises;¹ but if it is his duty to take possession of real estate and he neglects to do so during the period of his appointment he is chargeable with rent for such premises.² Before a landlord is entitled to a lien under the statute of 8 Anne, chap. 14, § 1, his rent must be due, and when his rent is not due until after the goods are sold he cannot be a preferred creditor.³ A person having a claim for rent upon property in the possession of a receiver appointed by the court should apply to the court upon notice to the receiver, for an order upon the receiver to pay the rent or for leave to proceed by distress or otherwise.⁴ The rental value of rolling stock while it is in the hands of the receiver appointed at the instance of a mortgagee in a proceeding instituted to foreclose a mortgage, if used by the receiver in operating a railroad is properly allowed as a prior lien to the mortgage indebtedness.⁵

§ 122. On unexpired leases.

An ordinary chancery receiver appointed in a foreclosure proceeding does not, simply by virtue of his appointment, become liable upon the covenants and agreements of the person or corporation over whose property he is appointed; and in case of a receivership of a railroad he is entitled to a reasonable time in which to elect whether he will adopt a lease in which the railroad company is the lessee or return the leased property to the lessor or owner.⁶ He does not by reason of his appointment become an assignee of the term,⁷ and in such case it is a proper matter of

¹*Fidelity Safe Deposit & T. Co. v. Armstrong*, 85 Fed. Rep. 567.

²*Downs v. Allen*, 10 Lea, 652.

³*Gaither v. Strockbridge*, 67 Md. 222.

⁴*Noe v. Gibson*, 7 Paige, 518.

⁵*Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 879. Such rental should be fixed not at the actual mileage but at its reasonable value.

⁶*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 682; *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 36 L. ed. 640. And the same rules apply to leases of rolling stock, which are coupled with an option to buy and the privilege of returning in case of an inability to pay

therefor, on the payment of the stipulated rental. *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 35 L. ed. 1025; *Com. v. Franklin Ins. Co.* 115 Mass. 278; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. ed. 915; *Southern Exp. Co. v. Western N. C. R. Co.* 99 U. S. 191, 25 L. ed. 319; *Coe v. New Jersey M. R. Co.* 27 N. J. Eq. 37; *United States Trust Co. v. Wabash & W. R. Co.* 150 U. S. 287, 37 L. ed. 1085; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Re Otis*, 101 N. Y. 580; *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 42 Fed. Rep. 6.

⁷*Glenny v. Langdon*, 98 U. S. 20, 25 L. ed. 43; *American Fide Co. v. Garrett*, 110 U. S. 288, 28 L. ed. 149; *Re*

consideration by the court whether the adoption of the lease and the operation of the leased road would be a burden upon the receiver, and the property in his hands,¹ and one of the elements entering into such a question is whether the cost of maintaining such leased line prior to the surrender to the receiver exceeded the earnings thereof.² If, however, under the circumstances of the case the receiver become assignee of the term and is vested with the estate he is liable for the rent during the term of the receivership.³

§ 123. Adoption of lease by receiver.

As we have seen, neither the appointment of a receiver nor his taking possession of a leased line of road, or other leased property, makes him liable for the rental longer than he sees proper to retain possession thereof.⁴ Such leases, however, may be adopted by the receiver and thenceforth they become in all their covenants and conditions obligatory on the receiver and the property in his charge.⁵ The adoption by the receiver may be effected by a

Oak Pits Colliery Co. L. R. 21 Ch. Div. 322, 320; *Brown v. Toledo, P. & W. R. Co.* 35 Fed. Rep. 444; *People v. Universal L. Ins. Co.* 30 Hun, 142; *Easton v. Houston & T. O. R. Co.* 38 Fed. Rep. 784; *Fidelity Safe Deposit Co. v. Armstrong*, 35 Fed. Rep. 567.

¹*St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 36 L. ed. 640.

²*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632.

³*Brown v. Toledo, P. & W. R. Co.* 35 Fed. Rep. 444.

⁴See § 105.

Cf. *Gaither v. Stockbridge*, 67 Md. 222. If the key is surrendered and the leasehold property returned to the landlord before rent matures the landlord has no claim upon the receiver; if, however, he is still in possession when the rent matures the receiver may properly pay the accrued rent.

The refusal of a receiver of a national bank which went into insolvency and was dissolved shortly after making a lease for a long term, to

take possession of the leased premises, does not entitle the lessor to damages out of the assets, where the rent was paid while the bank was in possession. *Fidelity Safe Deposit & T. Co. v. Armstrong*, 35 Fed. Rep. 567.

⁵*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632.

Where receivers of an insolvent railroad company agreed to accept certain rails contracted for before their appointment believing their acceptance would be for the benefit of the estate it was held to be an adoption and binding on the receivers though it was subsequently developed that the contract was a losing one. *Wabash, St. L. & P. R. Co. v. Central Trust Co.* 22 Fed. Rep. 269. And see *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 52 Fed. Rep. 908. It has been held, however, that an improvident contract of the receiver, detrimental to the trust should not be enforced, unless the contractor is ignorant of such improvidence and has

direct affirmation of his intention so to do with the landlord or lessor; or it may be done by acts on the part of the receiver which by implication will amount to an adoption. The rule upon this subject, as stated by Mr. Platt in his work on Leases,¹ and adopted by the United States Supreme Court² is as follows: "A reasonable time was allowed the assignees to ascertain the value of the lease before they made their election; for which purpose they might have it valued, or put up for sale without danger of such act being deemed an acceptance. If, however, they accepted a bidding, or dealt with the estate as their own or used it in a manner injurious to the persons otherwise entitled they were not within this protection." Where the receiver becomes liable for rent by

in good faith performed his part. *Vanderbilt v. Central R. Co.* 43 N. J. Eq. 669.

¹ Vol. 2, p. 435.

² *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 86 L. ed. 632. And see *Glenny v. Langdon*, 98 U. S. 20, 25 L. ed. 43; *American Fire Co. v. Garrett*, 110 U. S. 288, 28 L. ed. 149; *Sparhawk v. Yorkes*, 142 U. S. 1, 35 L. ed. 915. This doctrine was approved by the Court of Appeals of England in *Re Oak Pitts Colliery Co.* L. R. 21 Ch. Div. 322, upon the authority of *Re Lundy Granite Co.* L. R. 6 Ch. 462; *Re Brown, Bayley, & Dixon*, L. R. 18 Ch. Div. 649; and by Chief Justice Parker in *Berry v. Gillis*, 17 N. H. 9, upon the authority of *Smith v. Gordon*, 6 Law Rep. 313; *Copeland v. Stephens*, 1 Barn. & Ald. 602, and other cases cited; and by Mr. Justice Endicott in *Com. v. Franklin Ins. Co.* 115 Mass. 278, upon the authority of *Copeland v. Stephens*, *supra*; *Thomas v. Pemberton*, 7 Taunt. 206; *Hill v. Dobie*, 8 Taunt. 325; *Ansell v. Robson*, 2 Crompt. & J. 610; *Hanson v. Stevenson*, 1 Barn. & Ald. 303; *Ex parte Paxon*, 1 Low, Dec. 404; *Martin v. Black*, 9 Paige, 641; and by Chancellor Walworth in *Martin v. Black*, 9 Paige, 641, upon the authority of

Bourdillon v. Dalton, 1 Peakes, N. P. 238; *Wheeler v. Braham*, 8 Campb. 340; *Clarke v. Hume*, 1 Ryan & M. 206, and others. The Chancellor says: "If the assignee elects to waive the term and neither enters upon the demised premises nor does any other act signifying his acceptance of the terms as assignee he is not liable for the rent, * * * but if the assignee enters upon the demised premises, or does any other act which is equivalent to signify his assent to accept the terms as the assignee of the lease he will become the tenant of the premises and render himself liable for the rent." Justice Endicott says: "There must be some occupation and use of or some dealing and intermeddling with the estate, or some act, admission or agreement which in terms or by necessary implication indicates an election."

In proceedings to compel a receiver in a foreclosure action to pay rent for use of tracks and terminal facilities, where the amount of rent was left uncertain, a contract between other parties, oppressive in its terms, is not a test of the amount of rent which the receiver should pay; and it not being shown that the sum paid by the receiver was insufficient, the dismissal

reason of his occupancy of the demised premises the liability will be for a reasonable rental,¹ during the period of his occupancy.²

Such leases do not become binding upon the receiver by reason of the bill being filed for the purpose of preventing a disintegration of the system, nor by reason of the fact that the receiver has remained in possession of the leasehold property for some time, the lessor not having taken possession, or demanded possession by reason of a breach of the conditions of the lease.³

§ 124. Liability on leases made without order of court.

Where a receiver of a railroad company is authorized "to make all contracts necessary in carrying on the business, subject to the supervision of the court," he has no authority to make a lease for a term of general offices without the sanction of the court, and to bind his successors, and the property, therefor for the term, and the fact that his accounts showed monthly the payment of rent under such lease, and that the rent was reasonable and that the accounts as rendered were passed upon by the master and reported to, and approved by the court, do not amount to a sanction by the court of the lease for the term.⁴

§ 125. On contracts other than leases.

Similar rules to those applicable to leases are applicable to the general contracts of the person or corporation over whose property the receiver is appointed, which are in force at the time of the receiver's appointment. Thus a receiver of a railroad com-

of the proceedings was proper. *Peoria & P. U. R. Co. v. Chicago, P. & S. W. R. Co.* 127 U. S. 200, 32 L. ed. 110.

¹*Bell v. American Protective League*, 163 Mass. 558, 28 L. R. A. 452.

²*United States Trust Co. v. Wabash W. R. Co.* 150 U. S. 287, 37 L. ed. 1085; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197; *Re Oak Pitts Colliery Co.* L. R. 21 Ch. Div. 328; *Re Blackburn & Dist. Ben. Bldg. Soc.* L. R. 42 Ch. Div. 343; *Gaither v. Stockbridge*, 67 Md. 222; *Re Otis*, 101 N. Y. 580; *Quincy, M. & P. R. Co. v.*

Humphreys, 145 U. S. 82, 36 L. ed. 632; *Coe v. New Jersey M. R. Co.* 27 N. J. Eq. 37; *Re Silkstone & D. Coal & I. Co.* L. R. 17 Ch. Div. 158.

As to the liability of an assignee in bankruptcy or insolvency, see *Hoyt v. Stoddard*, 2 Allen, 442; *Patten v. Deshon*, 1 Gray, 325; *Sanders v. Partridge*, 108 Mass. 556; *Abbott v. Stearns*, 139 Mass. 168; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197.

³*New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.* 58 Fed. Rep. 268.

⁴*Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 L. ed. 819.

pany is not liable for removing a switch which the company was under contract to maintain at a certain place.¹ In another case, however, in the same state where in consideration of the grant of the right of way across land the railroad company agreed to erect a water tank on the land and maintain the same, which was to be supplied with water from a spring for which compensation was to be made, it was held that there was a lien upon the earnings of the road in the hands of a receiver to secure such payment and a right of action against the receiver for breach of contract.² A receiver cannot under a contract between his principal and another person enter upon and use the property of the latter and without his consent repudiate or change the terms thereof, and if the receiver uses a railroad track under the terms of a lease he is bound to pay the rent according to the terms thereof.³ The general rule upon the subject of the liability of the receiver upon the contracts of the debtor, in the absence of a lien, is that he is not liable.⁴ This rule is based upon the fact that the receiver is not the representative of the debtor for the fulfillment of his contracts except in such cases as he may adopt the contract as his own.

§ 126. On contracts of predecessor.

A receiver is not, as such, liable on the contracts of his predecessor and cannot be sued thereon; he is not a party thereto by execution or adoption, and in the absence of instruction by the court is not obliged to perform them, nor is he the representative

¹*Brown v. Warner*, 78 Tex. 543, 11 L. R. A. 394.

²*Howe v. Harding*, 76 Tex. 17.

³*St. Louis & C. R. Co. v. East St. Louis & C. R. Co.* 39 Ill. App. 354, affirmed in 139 Ill. 401, on other grounds.

⁴*Central Trust Co. v. Marietta & N. G. R. Co.* 51 Fed. Rep. 15, 16 L. R. A. 90; *Southern Exp. Co. v. Western N. C. R. Co.* 99 U. S. 194, 25 L. ed. 320; *Brown v. Warner*, 78 Tex. 543, 11 L. R. A. 394. Cf. *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 32 Fed. Rep. 566; *Ellis v. Boston, H. & E. R.*

Co. 107 Mass. 1; *Elmira Iron & S. Rolling Mill Co. v. Erie R. Co.* 26 N. J. Eq. 284.

A note executed by a corporation to one who has previously given a check drawn to the individual order of its vicepresident, which has been used by the corporation for its own purposes, is a valid claim against the corporation or a receiver appointed in proceedings for its dissolution. *People v. American Steam Boiler Ins. Co.* 3 App. Div. 504, Aff'g. 14 Misc. 163.

of his predecessor in the legal sense of the term,¹ nor can damages be imposed upon him for a failure to perform them,² but under some circumstances such contracts may be a charge against the trust property. It would seem that if the contract of a receiver is made by order of court it is binding on the estate, and upon a subsequent receiver.³

§ 127. Order of payment; preferred payments.

In foreclosure proceedings it frequently becomes important to determine the order of payment. It may be stated as a rule, however, that a claimant is not entitled to an allowance from the property in the receiver's hands or from the earnings of such property, in preference to the mortgage bondholders where the claim grows out of an alleged breach of contract,⁴ nor are rentals for rolling stock entitled to preference from the proceeds of sale, over lienholders under a mortgage, where there is nothing sold except the mortgage property, and when the receiver is appointed on a bill filed by a general creditor, and where the property did not sell for a sufficient amount to pay the mortgage indebtedness.⁵ Nor has the court a right to make the appointment of a receiver conditioned upon the payment of the unsecured indebtedness.⁶

¹*Lehigh Coal & Nav. Co. v. Central R. Co.* 38 N. J. Eq. 175.

²*Lehigh Coal & Nav. Co. v. Central R. Co.* 41 N. J. Eq. 167. And where he has doubts about the fairness of the contracts of its predecessor it is his duty to refuse to perform them. It was held, however, by the same court in *Kerr v. Little*, 42 N. J. Eq. 528, that a suit for damages could be maintained against a receiver for the non-performance of the contract of a former receiver.

³*Farmers' Loan & T. Co. v. Burlington & S. W. R. Co.* 32 Fed. Rep. 805.

⁴*Central Trust Co. v. Wabash, St. L. & P. R. Co.* 32 Fed. Rep. 566.

⁵*Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379.

⁶*Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379. Upon this question, Mr. Justice Brewer,

speaking for the court, says: "Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage

It may be stated, however, that if, at the instance of any party rightfully entitled thereto, the court should appoint a receiver of property, the same being railroad property and therefore under an obligation to the public, of continued operation he, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies or rentals, and make such expenses a prior lien on the property itself.' As between the conflicting interests of general creditors,

debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, where a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged, must be assumed to have dealt with it on the faith of its personal responsibility and not in expectation of subsequently displacing the priority of the mortgage liens."

'See last preceding note.

A receiver of a railroad is not liable, individually, upon contracts made as receiver where he has not pledged his own credit.

Newman v. Davenport, 9 Baxt. 538.

A rule has been adopted in the seventh circuit though not fully or expressly formulated in any decision, to allow preferential payments for labor supplies and equipment from the income during the receivership, or from the sale of property mortgaged, for a period of six months preceding the appointment of a receiver. *Thomas v. Peoria & R. R. Co.* 86 Fed. Rep.

808. The remainder due on a locomotive sold to a railroad company more than six months prior to the time the road went into the hands of a receiver cannot be allowed out of the earnings of the receivership in preference to the claims of bondholders under a prior mortgage, but is to be classed with the general corporate indebtedness. *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115, 9 L. R. A. 140. It has been held that a receiver is liable for the good will of the concern over which he has been appointed receiver. *Merchants Nat. Bank v. Landauer*, 68 Wis. 44.

A trustee of the bondholders of a railroad company who resists the return of cars delivered to such company from a lessee of the cars under a contract providing for their final sale with a reservation of title in the lessor until they should be fully paid for, and who participates in procuring an order to restore them to such lessor, is estopped to deny that the rental of the cars is an expense of the receivership of such railroad company prior in dignity to the lien of the mortgage securing the bonds. *Lans v. Macon & A. R. Co.* 96 Ga. 630.

A pledge of the revenues to be earned by an electric light company under its contract with a city will not entitle the pledgee to the payments to be made by the city as against the receivers, where nothing will become

and the bondholders secured by a first mortgage, where not only the real estate but the personalty is taken possession of by a receiver and a sale made of both, questions of difficulty have presented themselves, and no general rule can possibly be stated applicable to all cases. The following propositions have been recently established, or reiterated, by the Supreme Court of the United States relative to the rights of mortgagees and general creditors and their priority with respect to each other.

(a) Where a judgment creditor files a bill and on his application a receiver is appointed for an insolvent railroad company and possession is taken of the property of the company, real and personal, the mortgage covering the realty only, the lien of the judgment creditor has priority as to the personalty and the lien of the bondholder under the mortgage has priority as to the realty, and neither is charged with a deficiency from the other.

(b) Where a bondholder files a bill to foreclose his mortgage and on his application a receiver is appointed for a railroad company, and the receiver takes possession of the property of the company, real and personal, the personal for the benefit of the real, there is an implied consent on the part of the bondholder that the rental value of the personalty shall be paid in preference to his claim, as one of the expenses of the receivership, and thus, in this case, the realty is burdened with the rental of the personalty as an operating expense.

The liability of a receiver for the use of cars under a contract which is invalid, is the amount which similar cars could be rented for in the open market.¹

§ 128. When personally liable.

As a rule the receiver is only liable in his official capacity and from the receivership fund in his hands;² but he may make him-

due from the city until the services required by the contract for each month have been performed, and such services cannot be performed except at a heavy expense, which must be paid by the receivers, as the contract of assignment of revenues to be earned is executory, and vests no right in favor of the assignees until the ser-

vices are rendered, and the receivers have the right to elect either to carry out or renounce such executory contracts. *United Electric Securities Co. v. Louisiana Electric Light Co.* 71 Fed. Rep. 615.

¹ *Thomas v. Peoria & R. I. R. Co.* 36 Fed. Rep. 808.

² *Kain v. Smith*, 80 N. Y. 458.

self personally liable, as where he is operating property by contract or lease in connection with receivership property, in which case he is individually liable for an injury occurring to a person growing out of the use of the property operated by him under contract or lease, and generally it may be stated that he is personally liable where his contract is personal.¹ If the law were such that a receiver would be personally liable upon contracts made in his official capacity, or for torts committed by his subordinates, no capable person would be willing to act as receiver and assume such responsibilities, and particularly so in the matter of receivership of railways and large corporations, where a large number of subordinates are necessarily employed.² And a judgment against a receiver must be against him officially and payable from the receivership funds.³ But if the receiver incurs expenses and charges without sufficient funds in his hands to

¹ *Klebsch v. Seidler*, 57 N. Y. S. R. 508; *Knowles v. Scott*, 64 L. T. 135; *Davenport v. Alabama & C. R. Co.* 2 Woods, 519; *Vilas v. Paige*, 106 N. Y. 489; *Com. v. Runk*, 26 Pa. 235; *Hopkins v. Connel*, 2 Tenn. Ch. 323; *Little v. Dusenberry*, 46 N. J. L. 614.

Although a note may have been handed to a receiver that he might allow it as a mortgage debt, he promising to attend to it, and negligently failing to do so, he cannot be held answerable as receiver in a court of chancery for such neglect. The liability is a personal one solely, to be enforced at law. *Keene v. Gaehle*, 56 Md. 343.

It was held in *Erwin v. Davenport*, 9 Heisk. 44, that a receiver is personally liable for an injury resulting from defective machinery, if he has knowledge of such defect; but in such case there must be personal negligence on the part of the receiver, negligence of his employees alone not being sufficient. *Camp v. Barney*, 4 Hun, 878; *Cardot v. Barney*, 68 N. Y. 281; *Kain*

v. Smith, 80 N. Y. 458; *Lyman v. Central Vermont R. Co.* 59 Vt. 167.

Under Tex. Rev. Stat. § 2899, it was held that a receiver was not "proprietor, owner, charterer or hirer" of a railroad within the purview of the statute, and therefore not liable for the death of a person caused by the negligence of the receiver or his employees. The statutes in Ohio (*Mearns v. Holbrook*, 20 Ohio St. 187) and New Jersey (*Little v. Dusenberry*, 46 N. J. L. 614) were materially different from the Texas statute. And see *Lamphear v. Buckingham*, 83 Conn. 238.

² *Farmers Loan & T. Co. v. Central R. Co.* 2 McCrary, 181; *Davis v. Duncan*, 19 Fed. Rep. 477.

³ *Woodruff v. Jewett*, 37 Hun. 205, 115 N. Y. 267; *Davis v. Duncan*, 19 Fed. Rep. 477. The proceeding is in the nature of a proceeding *in rem*. It seems however that he may waive the right to be sued officially only. *Camp v. Barney*, 4 Hun, 878; *Newell v. Smith*, 49 Vt. 255.

meet them, he may become personally liable;¹ so also if he commits a tort while acting beyond the scope of his authority.²

§ 129. **Liability for attorney's fees.**

An action cannot be maintained against a receiver for services rendered by an attorney to an insolvent corporation after a receiver has been appointed.³ An allowance of counsel fees is made to the receiver and not to the counsel,⁴ the amount being usually determined by the circumstances of each particular case, and corresponding with the degree of responsibility, the business ability required in the management of the affairs entrusted to him, the perplexity and difficulty involved, and consequently the court in its discretion is allowed a large latitude.⁵ A receiver has a right to place the collection of insurance policies in the hands of competent attorneys, and will be liable for and allowed attorney's fees therefor, though the insurance may have been paid without litigation.⁶ A liquidator in a voluntary winding up is not personally responsible to the solicitor employed by him in the affairs of liquidation.⁷

¹ *Rogers v. Wendell*, 54 Hun, 540.

Compare *Peacock v. Pittsburg Locomotive & Car Works*, 52 Ga. 417. In this case an order appointing a receiver was rescinded and he turned back to the company property for which a possessory warrant had been issued.

² *Curran v. Craig*, 22 Fed. Rep. 101; *Bank of Montreal v. Thayer*, 7 Fed. Rep. 622; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 857; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 572.

³ *Barnes v. Newcomb*, 89 N. Y. 108.

⁴ *International Improv. Fund Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Stuart v. Bouhoare*, 133 U. S. 78, 33 L. ed. 568.

⁵ Note preceding.

A receiver of an estate who employs attorneys to advise and assist him in performing duties which his acceptance of the trust presupposes him to be capable of performing himself

must pay them out of his own means. *Henry v. Henry*, 103 Ala. 582.

⁶ *Abbott v. Downer*, 54 Iowa, 687.

⁷ *Trueman, Hooke, v. Piper*, L. R. 14 Eq. 278. This, however, must be understood to be in the absence of an express contract. *Re Anglo Moravian Hungarian Junction R. Co.* L. R. 1 Ch. Div. 180, 45 L. J. Ch. 115.

One who rendered legal services to a corporation upon an employment by its officers during the pendency of an action for the appointment of a receiver for its property, and before the same passed under the receiver's control,—*Held*, to be entitled to set off the value of such services against an account due by him to the corporation, and which also accrued prior to the receivership, but not against a further account which accrued during the administration of the receiver. *Cook v. Cole*, 55 Iowa, 70.

Money collected by a receiver under a void appointment may be recovered from him in an action for money had and received.¹

§ 130. For disobeying orders of court.

A receiver will be liable where he invests the receivership funds contrary to the order of court,² and where he fails to pay a certain sum, pursuant to an order of court, the surety on his bond is liable for the amount, though the surety is not a party to the proceeding resulting in the order; such an order is conclusive on the surety, and he cannot insist that the receiver had disbursed all the funds.³ The court will at all times be vigilant to see that parties interested in the trust fund are not injured by the improvident acts of the receiver.⁴ The receiver will be liable for trespass where he has unlawfully taken possession of property not included in the trust, and this though he takes possession under an order of court;⁵ but where he sells property pursuant to the order of sale he is not a trespasser, nor are those aiding and assisting him.⁶ The order appointing a receiver in foreclosure proceedings embracing property not included in the mortgage, is to that extent in excess of the jurisdiction of the court and void; and the receiver may be held liable to the general creditors of the mortgagee for any profits arising from such prop-

¹ *Johnson v. Powers*, 21 Neb. 292.

² *Carr v. Morris*, 85 Va. 21.

³ *Thomson v. McGregor*, 18 Jones & S. 197.

A decree directing a general receiver of the court to pay out of a fund in his hands a certain sum to a certain person is binding upon him, although he was not made a party to the suit in which it was rendered, and no notice thereof was given to him. *Crawford v. Fickey* (W. Va.) 23 S. E. 662.

⁴ *Turner v. Peoria & S. R. Co.* 95 Ill. 184.

⁵ *Curran v. Craig*, 22 Fed. Rep. 101; *Hartell v. Tighman*, 99 U. S. 547, 25 L. ed. 857; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Hills v. Parker*, 111 Mass. 508. But see *Ward v. Moffett*, 38 Mo. App. 395.

Where all mining property of a company was a part of the same system of operation, and the proceeds of ore extracted from a portion of the mines were used indiscriminately for the common benefit of the whole property, a receiver appointed on a foreclosure of a mortgage covering only a part of the property, who was given power to take possession of the premises and carry on the mines, is a trespasser, and is personally liable to a general creditor for sums realized from a mine not covered by the mortgage. *Staples v. May*, 87 Cal. 178, overruling same case in Department One, reported in 23 Pac. 710.

⁶ *Walling v. Miller*, 108 N. Y. 173.

erty;¹ and where he wrongfully takes property it may be replevied.² If he extracts ores from land not involved in the foreclosure proceedings, he is liable to the mortgagor therefor.³

§ 131. To account.

The receiver is not liable to account pending the suit and the funds must remain in his hands until the rights of all parties are finally passed upon.⁴ He must account for all money coming into his hands in his official capacity, whether he receives the money before he gives bond or afterwards.⁵ The usual practice is for the receiver's account to be referred to a master for examination and passing.

§ 132. Order on receiver to pay, effect of.

Where a receiver has been ordered to pay money in his hands it is his duty to comply with such order, and a refusal on his part may be treated as a contempt, and he may be punished accordingly;⁶ but it must be understood in such case that before an order of contempt is issued the receiver must be given an opportunity to be heard, and the correctness of the order to pay will not be considered on an appeal from an order to show cause.⁷ If in a proceeding to which the receiver has not been made a party he is ordered to pay money or deliver property in his hands, he is not bound by the order and is entitled to an opportunity to show that he has turned over a large part of the property.⁸ In West Virginia an order to pay to a party in the cause by a certain day has the effect of a judgment and is a lien on the receiver's land to be enforced as other judgment liens.⁹ He is not liable, in a foreclosure proceeding, to pay to a railroad company money to be used in contesting the validity of the bonds, or to pay salaries of the officers of the company, or office expenses.¹⁰

¹ *Staples v. May*, 87 Cal. 178.

² *Getsch v. Melhargey*, 69 Mich. 377.

³ *Staples v. May*, 87 Cal. 178.

⁴ *Musgrove v. Nash*, 3 Edw. Ch. 172.

⁵ *Smart v. Flood*, 49 L. T. 467; *Re Western Canada, etc., Ince.* 8 Prec. Rep. (Ont.) 262.

⁶ *Clark v. Binninger*, 75 N. Y. 344. The contempt in this case was statutory.

⁷ *Clark v. Binninger, supra*; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *People, Davis, v. Sturtevant*, 9 N. Y. 266; *Adair County v. Ownby*, 75 Mo. 282.

⁸ *How v. Jones*, 60 Iowa, 70.

⁹ *Rickard v. Schley*, 27 W. Va. 617.

¹⁰ *Union Loan & T. Co. v. Southern California Motor Road Co.* 51 Fed. Rep. 106.

§ 133. Effect of discharge.

The moment a receiver is discharged and relieved from the obligations of his office, all right upon the part of the court to proceed against him summarily ceases, and he is no longer subject to its jurisdiction, except such jurisdiction is acquired in the ordinary methods available to all suitors.¹

§ 134. Liability for unjust freights exacted.

A receiver of a railroad company, operating a railroad under the supervision of a federal court may be compelled to refund money exacted from a shipper where such exaction is an unjustifiable discrimination under a state law,² but he is not liable for a statutory penalty.³

§ 135. Power of court over executors of receivers.

The court has no power to order the receiver's executor or ad-

¹ In *New York & W. U. Teleg. Co. v. Jewett*, 48 Hun, 585, affirmed in 115 N. Y. 166. The court say: "Obviously after the receiver has been discharged, and the property, by the action of the court, has all been taken out of his hands there can be no propriety whatever in any further proceedings against him, because thereafter he ceases to represent anyone; he can no longer act for or represent the company or its creditors or any other person interested in the property; and manifestly the court could not thereafter make an order that he should pay a creditor, he no longer having any fund out of which payment could be made." *Farmers' Loan & T. Co. v. Central R. Co.* 2 McCrary, 181. Cf. *Corser v. Russell*, 20 Abb. N. C. 816.

Ryan v. Hays, 62 Tex. 42. But if before the order of discharge a judgment is rendered and the receiver is ordered to pay it the discharge of the receiver in another court without notice to the judgment creditor, *quære*. *Woodruff v. Jewett*, 115 N. Y. 267.

² *Outting v. Florida R. & Nav. Co.*

48 Fed. Rep. 747, and see also *Missouri P. R. Co. v. Texas P. R. Co.* 81 Fed. Rep. 862.

³ *Campbell v. Weiss* (Tex.) 25 S. W. 1076; *Bonner v. Franklin Co-Operative Asso.* 4 Tex. Civ. App. 166; *Missouri, K. & T. R. Co. v. Stoner*, 5 Tex. Civ. App. 50.

Turner v. Cross, 88 Tex. 218, 15 L. R. A. 262, but there may be a cause of action independent of the statutory penalty. *Bonner v. Franklin Co-Operative Asso.* *supra*; *Clark v. Dyer*, 81 Tex. 339.

The act of Congress of March 3, 1887, provides that receivers appointed in the United States courts who are in possession of property are required to administer it according to the laws of the state where situated, and where the state law imposes a duty upon a receiver which he neglects, he is liable. Thus if the statute imposes a duty of providing embankments with culverts and sluices sufficient to drain the surface water and the receiver neglects this duty, he is liable. (See Art. 4171, Sayles Civ. Stat.) *Clark v. Dyer*, *supra*.

administrator to bring in and pass his testator's or intestate's accounts and pay any balance due from the deceased receiver.¹ A bill must be filed for that purpose,² unless the representatives submit to such an accounting.³ Besides as a rule the liability of the receiver to account is covered by the bond given by him and resort to that is usually the proper course to be taken. It has been held, however, that if, at the time of a receiver's death a suit is pending against him for the purpose of compelling an accounting, the court may properly order his legal representatives to be made parties and continue the proceeding against them.⁴

§ 126. Liability for contempt of court.

A receiver who wilfully refuses to pay over money as ordered by the court may be proceeded against personally and committed for contempt,⁵ and he is liable in damages for his misconduct.⁶ Being an officer of, and at all times subject to the direction and control of the court, he must implicitly obey its commands and a refusal on his part subjects him to the penalty which the court under the circumstances may deem proper to inflict.

¹*Jenkins v. Briant*, 7 Sim. 171.

²*Ludgater v. Channell*, 15 Sim. 479.

³*Magan v. Fallon*, 5 Ir. Eq. 490;
Gurden v. Badcock, 6 Beav. 157;
Hovey v. Blakeman, 4 Ves. Jr. 606.

⁴*Re Columbian Ins. Co.* 30 Hun, 342;
Re Foster, 7 Hun, 129; *Livermore v. Bainbridge*, 49 N. Y. 130. See also Code Civ. Proc. §§ 414, 452.

⁵*Davies v. Cracroft*, 14 Ves. Jr. 148;
Re Bell, Foster, v. Bell, L. R. 9 Eq. 172; *Clark v. Bininger*, 11 Jones & S.

126, 344. See *Perkins v. Taylor*, 19 Abb. Pr. 146; *McIntosh v. Elliott*, 2 Grant, Ch. (Ont.) 396. As to an appeal from such order, see *People v. Jones*, 33 Mich. 303.

⁶*Stanton v. Alabama & O. R. Co.* 2 Woods, 506.

Pending the litigation, the receiver should not repay plaintiff's costs. *Olyphant v. St. Louis Ore. & S. Co.* 22 Fed. Rep. 179.

See § 111.

CHAPTER IX.

CREDITOR'S BILLS, SUPPLEMENTARY PROCEEDINGS, AND PROCEEDINGS IN AID OF EXECUTION.

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| <p>§ 146. General nature of remedy.</p> <p>(a) Chancery jurisdiction.</p> <p>(b) Based on inadequacy of common law remedies.</p> <p>(1) Common law remedies must be exhausted.</p> <p>(2) Claim must be reduced to judgment.</p> <p>(3) Execution returned <i>nulla bona</i>.</p> <p>(4) Exception to rule as to exhaustion of legal remedies.</p> <p>§ 147. Classes of creditor's proceedings.</p> <p>(a) In equity to annul fraudulent transfers.</p> <p>(b) Creditor's bills proper.</p> <p>(c) Supplementary proceedings, statutory.</p> <p>§ 148. Fraudulent conveyances.</p> <p>(a) Effect generally.</p> <p>(b) Rule as to execution.</p> <p>(1) Exception in case of lien by attachment.</p> <p>(2) of debtor's insolvency.</p> <p>(3) of fraudulent conveyances.</p> <p>(4) of levy on property conveyed.</p> <p>(5) of an absconding debtor.</p> <p>(6) of insolvent's estate.</p> <p>(7) of waiver by debtor.</p> <p>§ 149. Jurisdiction in matters of assignment.</p> <p>(a) Where assignment is fraudulent.</p> <p>(1) Where the debtor is to continue business.</p> | <p>(2) Where benefit to debtor reserved.</p> <p>(3) possession to remain with debtor.</p> <p>(4) debtor to derive personal benefit from partnership assets.</p> <p>(5) intentional omission of assets.</p> <p>(6) fictitious liabilities.</p> <p>(b) Where assignment is valid, but assignee fails or refuses to act.</p> <p>(1) Where the assignee fails or refuses to carry out the trust.</p> <p>(2) Where the assignee is guilty of mismanagement.</p> <p>§ 150. Supplementary proceedings.</p> <p>§ 151. Necessity of officers retaining execution, statutory period.</p> <p>(a) When required.</p> <p>(b) When not required.</p> <p>§ 152. Practice in code states.</p> <p>§ 153. Appointment of receiver, order, duties, etc.</p> <p>§ 154. Receivers powers in supplementary proceedings.</p> <p>§ 155. Functions.</p> <p>§ 156. Right to sue and be sued.</p> <p>§ 157. Order of appointment.</p> <p>§ 158. Power in foreign jurisdiction.</p> <p>§ 159. Priorities under creditor's bills.</p> <p>§ 160. Courts reluctant to appoint where legal title involved.</p> |
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§ 146. General nature of remedy.

(a) CHANCERY JURISDICTION.

Almost from the earliest history of chancery jurisdiction courts of equity have lent their assistance to the common law courts in

enabling the latter to enforce their judgments by removing obstructions in the way of levy and sale of the property of the judgment debtor. For the purpose of preventing the levy and sale of his property the judgment debtor has frequently, by colorable or pretended sales, placed the legal title to his property beyond the reach of the judgment creditor so that, with the ordinary common law execution, no available results could be obtained. Sometimes his tangible and movable property, or his choses in action, have been covered up, or otherwise concealed, and thus placed beyond the reach of the officer with his writ of execution. To meet this emergency, and to supply the defects of the common law courts, the early English chancery courts established this branch of its remedial jurisdiction, and in some form or other it has continued down to the present time, sometimes designated as "Creditor's Bills," and sometimes "Supplementary Proceedings," "Proceedings Supplementary to Execution," "Proceedings in Aid of Execution," and the like. Usually in this country the proceeding is regulated, in some of its details, by statute and especially in states adopting codes of civil procedure, but in the main the general features are similar in all the states. The appointment of a receiver in this class of proceedings is incidental to the general jurisdiction of the court, and usually is an element therein, his services being peculiarly appropriate in reducing property to possession, and preserving the same until final termination of the litigation.¹

¹In *Fusze v. Stern*, 17 Ill. App. 429, Mr. Justice Pleasants says: "There are several kinds of original bills known to our laws, wherein courts of equity entertain jurisdiction to aid a creditor in obtaining a satisfaction of his claim from his debtor, and which are generally denominated 'creditor's bills,' not only by the members of the legal profession, but by the courts as well, as where a creditor seeks to satisfy his debt out of some equitable estate of the defendant which is not subject to levy and sale under an execution at law. . . . Another kind of bill analogous to this is where the

creditor, having recovered judgment against his debtor seeks to remove a fraudulent conveyance or incumbrance out of the way of an execution issued or to be issued upon such judgment. . . . In another class of cases where the creditor seeks to satisfy his claim out of a fund charged with its payment and which can only be reached by proceedings in chancery, he may file his bill and establish his claim in that suit without having reduced it to a judgment at law."

Chancellor Walworth in *Beck v. Burdett*, 1 Paige, 305, says: "There are two classes of cases where a plain-

(b) BASED ON INADEQUACY OF COMMON LAW REMEDIES.

The foundation of this remedy is based upon the inadequacy of the ordinary common law remedies and the necessity

tiff is permitted to come into court for relief after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt. In one case the issuing of the execution gives the plaintiff a lien upon the property but he is compelled to come here for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on execution. In the other, the plaintiff comes here to obtain satisfaction of his debt out of property of the defendant which cannot be reached by execution at law. In the latter case his right to relief here depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction of his judgment. In the first case the plaintiff may come into this court for relief immediately after he has obtained a lien upon the property by the issuing of an execution to the sheriff of the county where the same is situated; and the obstruction being removed he may proceed to enforce the execution by a sale of the property although an actual levy is probably necessary to enable him to hold the property against other execution creditors or *bona fide* purchasers," citing *Angell v. Draper*, 1 Vern. 899; *Shirley v. Watts*, 8 Atk. 200; *McDermutt v. Strong*, 4 John. Ch. 687. Cf. *Bloodgood v. Clark*, 4 Paige, 574.

The proceedings under the code practice supplementary to execution, are very fully and clearly stated by Merrimon, J., in *Cooler Bros. v. Wilkes*, 92 N. C. 376. Cf. *Spencer v. Cuyler*, 9 Abb. Pr. 382; *People, Fitch v. Mead*, 29 How. Pr. 360.

Proceedings of a similar nature have been entertained by a court of chancery on a bill filed by creditors of an

insolvent banking corporation when the object sought was an equality of benefit and burden among a numerous class of persons similarly situated in respect to a particular fund. *Tunnesma v. Schuttler*, 114 Ill. 156. Cf. *Crandall v. Lincoln*, 52 Conn. 78; *Wood v. Dummer*, 8 Mason, 308.

In the absence of statutory power a court of chancery is without jurisdiction to decree a dissolution of a corporation, and where a statute as one of the causes for the dissolution of a corporation provides that if it has "ceased doing business," etc. the fact that the corporation ceased doing business by reason of the levy of attachments on the company property is not such a cause as is contemplated by the statute. It must be an actual ceasing and not such as is brought about by the enforcement of legal process. *People v. Weigley*, 155 Ill. 491.

When a creditor obtains judgment, issues execution, levies same upon lands alleged to have been fraudulently transferred, a receiver may be appointed for money in the hands of the clerk of court paid in as condemnation by a railroad company, after the fraudulent transfer. *Ahlhauser v. Doud*, 74 Wis. 400; *Ross v. Bevan*, 10 Md. 486; *Beam v. Bennett*, 51 Mich. 148.

Proceedings supplementary to execution in New York are statutory and do not belong to chancery jurisdiction but are auxiliary remedies in common law actions. *Ex parte Boyd*, 105 U. S. 647, 26 L. ed. 1200.

A creditor's bill may be brought under the chancery practice act of Illinois in all cases where the creditor or his representative is obliged by the nature of the interest sought to be

of the courts of equity lending their aid to the common law courts in the enforcement of the rights of creditors against the property of debtors, where the ordinary process is found to be inadequate. It is therefore to be understood as a prerequisite to this jurisdiction and the appointment of a receiver that the plaintiff—

(1) Shall have exhausted fully and completely his common law remedies for the collection of his judgment,¹ and in doing so shall have used due diligence.² The inadequacy of the common law remedy does not consist in its failure merely to produce the money—a misfortune often attendant upon all remedies—but that in its nature or character it is not fitted or adapted to the end in view.³

(2) The plaintiff's claim, as a rule, must also have been reduced to a judgment, jurisdiction not being exercised in behalf of a general creditor.⁴

reached to resort to a court of equity for relief as where the property is in the hands of trustees and the creditor has no lien thereon and can acquire none. *Spindle v. Shreve*, 111 U. S. 542, 28 L. ed. 512.

¹ *Parker v. Moore*, 3 Edw. Ch. 234; *Congdon v. Lee*, 3 Edw. Ch. 304; *Hart v. Tims*, 3 Edw. Ch. 226; *Cassidy v. Meacham*, 3 Paige, 311; *Smith v. Thompson*, Walk. Ch. 1; *Thayer v. Swift*, Harr. Ch. (Mich.) 480; *Steward v. Stevens*, Harr. Ch. (Mich.) 169; *Starr v. Rathbone*, 1 Barb. 70; *Second Ward Bank v. Upmann*, 12 Wis. 499; *Smith v. Weeks*, 60 Wis. 94; *Williams v. Sexton*, 19 Wis. 48; *Buckeye Engine Co. v. Donau Brew. Co.* 47 Fed. Rep. 6; *McElwain v. Willis*, 9 Wend. 561; *Clark v. Bergenthal*, 52 Wis. 103; *Re Remington*, 7 Wis. 651. See also § 121. *Smyth v. New Orleans Canal & Bkg. Co.* 141 U. S. 661, 35 L. ed. 893; *Scripps v. King*, 103 Ill. 469; *McDowell v. Cochran*, 11 Ill. 81; *Armstrong v. Coopes*, 11 Ill. 560; *Van Syckle v. Richardson*, 18 Ill. 174; *Bay v. Cook*, 31 Ill. 336; *Manchester & L. Dist. Bkg.*

Co. v. Parkinson, L. R. 22 Q. B. Div. 178; *Harris v. Beauchamp Bros.* [1894] 1 Q. B. 801.

² *Fogarty v. Burke*, 2 Drury & W. 580; *National Mechanics Bkg. Asso. v. Mariposa Co.* 60 Barb. 423; *Gould v. Tryon*, Walk. Ch. 353.

³ *Thompson v. Allen County*, 115 U. S. 550, 29 L. ed. 472; *Jones v. Green*, 68 U. S. 1 Wall. 330, 17 L. ed. 553.

⁴ *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358; *Swan Land & C. Co. v. Frank*, 148 U. S. 612, 37 L. ed. 581; *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 57 Fed. Rep. 698, 24 L. R. A. 417, 60 Fed. Rep. 341; *United States v. Ingate*, 48 Fed. Rep. 253; *Cates v. Allen*, 149 U. S. 456, 37 L. ed. 807; *Zell Guano Co. v. Heatherly*, 88 W. Va. 416; *National Tube Works Co. v. Ballou*, 146 U. S. 577, 36 L. ed. 1070; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113; *Adler v. Fenton*, 55 U. S. 24 How. 407, 16 L. ed. 696; *Smith v. Ft. Scott, H. & W. R. Co.* 99 U. S. 398, 25 L. ed. 437; *Day v. Washburn*, 65 U. S. 24 How. 352, 16 L. ed. 712; *Scripps v. King*,

(3) And as a general rule execution must have been issued on such judgment and a return made by the proper officer, *nulla bona*.¹

(4) The rule that a judgment at law is a prerequisite to a proceeding in chancery has its exceptions, however, which have been recognized by the courts, particularly in some cases involving fraud, and the rule has been less strictly enforced in states where chancery and common law procedures have become blended.*

108 Ill. 469; *Newman v. Willetts*, 52 Ill. 98; *Bigelow v. Andress*, 81 Ill. 322; *Getzler v. Saront*, 18 Ill. 511, *Greenway v. Thomas*, 14 Ill. 271; *Ishmael v. Parker*, 18 Ill. 324; *Smith v. Los Angeles County Super. Ct.* 97 Cal. 348; *Dodge v. Pyrolusite Manganese Co.* 69 Ga. 665; *Johnson v. Farnum*, 56 Ga. 144; *Clark v. Raymond*, 84 Iowa, 251; *May v. Grenhill*, 80 Ind. 124; *McGoldrick v. Stevin*, 43 Ind. 522; *Rich v. Levy*, 16 Md. 74; *Hubbard v. Hubbard*, 14 Md. 356; *Nusbaum v. Stein*, 12 Md. 815; *Blondheim v. Moore*, 11 Md. 365; *Uhl v. Dillon*, 10 Md. 500; *Holdrege v. Gwynne*, 18 N. J. Eq. 26;

To entitle a creditor to a receiver he must have a judgment or a lien on the property. *San Antonio & G. S. R. Co. v. Davis*, (Tex.) 2 Am. & Eng. Corp. Cas. N. S. 874. *Young v. Frier*, 9 N. J. Eq. 465.

¹ *Adee v. Bigler*, 81 N.Y. 349; *Bayaud v. Fellows*, 28 Barb. 451; *Wiggins v. Armstrong*, 2 John. Ch. 144; *Hendricks v. Robinson*, 2 Johns. Ch. 296; *Carter v. Hightower*, 79 Tex. 185; *Zell Guano Co. v. Heatherly*, 85 W. Va. 416; *Rhodes v. Cousin*, 6 Rand. (Va.) 188; *Hulse v. Wright*, Wright (Ohio) 61; *Mizell v. Herbert*, 12 Smedes & M. 550; *Skeels v. Stanwood*, 83 Me. 309. *Gorton v. Massey*, 12 Minn. 147.

A judgment cannot be questioned on a creditor's bill brought to secure its payment. *Mattingly v. Nye*, 75 U. S. 8 Wall. 370, 19 L. ed. 380.

Execution must be sent to the county

where the defendant has property if known to the plaintiff. *Minkler v. United States Sheep Co.* 4 N. D. 507, 2 Am. & Eng. Corp. Cas. N. S. 368, overruling *Paulson v. Ward*, 4 N. D. 100; and see *Durand v. Gray*, 124 Ill. 9.

* It has been held, however, that a judgment is not necessary in the following cases usually involving fraud, or where the delay of getting judgment would not benefit any one, or where the debt is undisputed, or where the creditors have a special lien.

Morrison v. Shuster, 1 Mackey, 190; *Martin v. Burgoyn*, 88 Ga. 78; *Wolfe v. Clafin*, 81 Ga. 64; *Orton v. Madden*, 75 Ga. 83; *Oliver v. Victor*, 74 Ga. 543; *Cohen v. Morris*, 70 Ga. 813; *Crittenden v. Coleman*, 70 Ga. 298; *Wachtel v. Wilde*, 58 Ga. 50; *Kehler v. Jack Mfg. Co.* 55 Ga. 639; *Cohen v. Meyers*, 42 Ga. 46; *Rosenberg v. Moore*, 11 Md. 376; *Thompson v. Difenderfer*, 1 Md. Ch. 489; *Chamberlain v. O'Brien*, 46 Minn. 80; *Sorley v. Brewer*, 18 How. Pr. 276; *Levy v. Ely*, 15 How. Pr. 395; *La Chaise v. Lord*, 10 How. Pr. 461; *Mott v. Dunn*, 10 How. Pr. 225 (see code); *Jackson v. Sheldon*, 9 Abb. Pr. 127; *Haggarty v. Pittman*, 1 Paige, 298; *Regenstein v. Pearlstein*, 30 S. C. 192; *Meinhard v. Strickland*, 29 S. C. 491; *Todd v. Lee*, 15 Wis. 365; *Taylor v. Bowker*, 111 U. S. 110, 28 L. ed. 368.

Cf. *Johnson v. Powers*, 18 Fed. Rep. 315, affirmed in 186 U. S. 156, 85 L.

§ 147. Classes of creditor's proceedings.

There are three classes of proceedings generally denominated "Creditor's proceedings," the first of which is the ordinary suit in equity, the purpose of which is to annul some particular transaction or transfer, or remove some particular cloud upon the title.¹ The second is the creditor's bill proper, which is broader in its scope and therefore not inaptly called an "Omnibus bill," the purpose being not only to reach property therein described, but any other property of the debtor, assets or even debts due him, which were unknown to the creditor, and is in the nature of a bill of discovery.² The third is the statutory proceeding usually designated "Supplementary proceedings," which in a general sense will reach whatever could have been reached under the ordinary

ed. 112; *Pullman v. Stebbins*, 51 Fed. Rep. 10; *Beverly v. Rhodes*, 86 Va. 415; *Rice v. Hartman*, 84 Va. 251; *Duerson v. Alsop*, 27 Gratt. 229; *Carter v. Hampton*, 77 Va. 631; *Hurn v. Keller*, 79 Va. 415; *Case v. New Orleans & C. R. Co.* ("Case v. Beauregard") 101 U. S. 688, 25 L. ed. 1004.

It is well settled that a creditor with an established claim against an estate may come into a court of chancery against an executor for the discovery and distribution of assets; and that he may have a bill against heirs and devisees to subject real estate descended, there being a deficiency of personal assets to the payment of decedent's debts. *Houston v. Levy*, 44 N. J. Eq. 6; *Thompson v. Brown*, 4 John. Ch. 619; *Kennedy v. Creswell*, 101 U. S. 641, 25 L. ed. 1075; *Mallory v. Craige*, 15 N. J. Eq. 78; *Coddington v. Bishop*, 36 N. J. Eq. 574.

Where a creditor has a trust in his favor he may go into equity without exhausting legal processes or remedies. If he avers insolvency so that a suit at law and the recovery of a judgment would not afford any relief, that is enough to show there is a remedy in equity. *Case v. New Orleans & C. R. Co.* ("Case v. Beauregard") 101 U. S. 688, 25 L. ed. 1004.

Where a claim can only be satisfied out of a fund which is accessible to a court of chancery only, the claim need not be established in a court of law. *Russell v. Clark*, 11 U. S. 7 Cranch, 69, 3 L. ed. 271.

The same rule applies when the claim is against a deceased person and a bill is filed against his executor for the discovery of assets. *Kennedy v. Creswell*, 101 U. S. 641, 25 L. ed. 1075; *Thompson v. Brown*, 4 John. Ch. 619. And a creditor's bill will lie against an administrator of a deceased judgment debtor and a third person to whom it is alleged the debtor fraudulently conveyed assets. *Hagan v. Walker*, 55 U. S. 14 How. 29, 17 L. ed. 312. The equity jurisdiction in such case is not auxiliary to the legal process.

¹*Lynch v. Johnson*, 48 N. Y. 33; *Brown v. Nichols*, 42 N. Y. 26; *Roberts v. Albany & W. S. R. Co.* 25 Barb. 662; *George v. Williamson*, 26 Mo. 190; *Newman v. Willets*, 52 Ill. 98; *Weightman v. Hatch*, 17 Ill. 281; *Miller v. Davidson*, 8 Ill. 518.

²*Newman v. Willets*, 52 Ill. 98; *Conroy v. Port Henry Iron Co.* 12 Barb. 58.

creditor's bill, but the proceedings are more simplified.¹ This procedure is usually by order made upon proof of the return of an execution unsatisfied, requiring the debtor to appear in person before the court and be examined concerning his property,² and on the discovery of property the receiver is appointed, who after qualifying becomes vested with the debtor's property and equitable assets.³

§ 148. Fraudulent conveyances.

(a) EFFECT GENERALLY.

One of the main features of this branch of equity jurisprudence, is to enable a judgment creditor to reach, for the purpose of satisfying his judgment, the property of the judgment debtor that has been transferred prior to the judgment for the purpose of hindering, delaying, and defrauding his creditors, in which case, upon proper showing, it follows almost as a matter of course that a receiver will be appointed pending the litigation.⁴ A receiver may

¹*Spencer v. Oyler*, 9 Abb. Pr. 383; *Becker v. Torrance*, 31 N. Y. 631; *Lynch v. Johnson*, 48 N. Y. 33; *Barker v. Dayton*, 28 Wis. 367; *Smith v. Weeks*, 60 Wis. 100; *Barnes v. Morgan*, 3 Hun, 703; *Williams v. Thorne*, 70 N. Y. 270.

²*Bartlett v. McNiel*, 49 How. Pr. 55. Affirmed in 60 N. Y. 53.

³*Boutwick v. Menck*, 40 N. Y. 383; *Cooney v. Cooney*, 65 Barb. 524; *Porter v. Williams*, 9 N. Y. 142.

It has been held that where the equity of the bill is not denied on the hearing the appointment follows as a matter of course. *Gage v. Smith*, 79 Ill. 219; *Bloodgood v. Clark*, 4 Paige, 574; *Corning v. White*, 2 Paige, 567; *Congdon v. Lee*, 8 Edw. Ch. 304; *Bank of Monros v. Schermerhorn*, Clark Ch. 214; *Austin v. Figueira*, 7 Paige, 56.

⁴The receiver has two methods of enforcing the judgments under which he is appointed against the real estate alleged to have been fraudulently conveyed by the judgment debtor: (1) he

may sell the real estate under an execution, perfect his title and test the question of fraud in an action of ejectment; (2) he may bring an equitable action to set aside the conveyance alleged to be fraudulent. *Maders v. Whallon*, 74 Hun, 872. In *Smith v. Reid*, 184 N. Y. 578, the court says: "A judgment creditor cannot be deprived of his legal right to enforce collection of his judgment against the lands of his debtor by a fraudulent conveyance thereof prior to the entry of the judgment, nor can he by such a conveyance be forced to pursue an equitable remedy, for the collection of his debt instead of a legal one and the whole current of authorities in this state is to the effect that, notwithstanding the fraudulent conveyance, the judgment creditor may sell the land under execution upon his judgment and the purchaser may impeach the conveyance of the land in a suit at law to recover possession, or if he can gain possession defend the title thus acquired against the fraudulent

maintain an action in the nature of a creditor's bill to avoid, in behalf of creditors, a fraudulent transfer as to them, so as to make the property available for the satisfaction of their debts.¹ In this

grantee or those claiming under him."

. . . "While the title remains in the fraudulent grantee, the lien of the judgment exists and may be enforced against the land, with the same effect as if the conveyance had not been made. As against the creditor, the conveyance, while the fraudulent grantee holds the title, is a nullity."

In either of the two proceedings above indicated, the burden of establishing fraud rests with the plaintiff. He must show satisfactorily that the conveyance was made and accepted with the purpose and intent of hindering, delaying, and defrauding the creditors of the grantor; that the deed was executed in bad faith and left the grantor insolvent and without ample to pay his existing debts and liabilities. *Maders v. Whallon, supra*; *Kain v. Larkin*, 181 N. Y. 300.

As to what are insufficient allegations of fraud on the part of directors of a corporation in bill by creditors asking for the appointment of a receiver, see *Fort Payne Furnace Co. v. Fort Payne Coal & I. Co.*, 96 Ala. 472; *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622.

A judgment creditor with an execution returned "no property found," and seeking by bill to subject the debtor's alleged interest in certain crops raised on a plantation carried on by another, has such a lien on such crops as entitles him to ask for a receiver to prevent their loss. *Micou v. Moses*, 72 Ala. 439.

A receiver appointed in a judgment creditor's suit, can hold the debtor's choses in action in preference to one who purchased the same of the debtor and paid for them, after notice of the

filing of the bill, and after attempts had been made, but without much diligence, to serve the subpoena. *Weed v. Smull*, 8 Sandf. Ch. 273.

A receiver appointed in supplementary proceedings, and suing to reach the property of the judgment debtor, which he alleges to have been assigned to delay, hinder, and defraud creditors, is not entitled to an injunction, unless he furnishes to the court some evidence that he was entitled to the relief demanded in his complaint, or has an apparent right to the property. The ordinary affidavit of verification of a complaint is not sufficient to establish any fact alleged therein on information and belief. *Bostwick v. Elton*, 25 How. Pr. 362. Cf. *Connah v. Sedgwick*, 1 Barb. 210; *Shainwald v. Lewis*, 7 Sawy. 148; *Goodyear v. Betts*, 7 How. Pr. 187.

¹*Dunham v. Byrnes*, 36 Minn. 106; *Bostwick v. Menck*, 40 N. Y. 383; *Wright v. Nostrand*, 94 N. Y. 81; *Hamlin v. Wright*, 23 Wis. 491; *Barker v. Dayton*, 28 Wis. 367; *Miller v. McKenzie*, 29 N. J. Eq. 291; and this as soon as judgment is obtained. *Newman v. Willels*, 52 Ill. 98; *Greenway v. Thomas*, 14 Ill. 271; *Weightman v. Hatch*, 17 Ill. 281; *Dewey v. Eckert*, 62 Ill. 218; *Miller v. Davidson*, 8 Ill. 518; *Lewis v. Lanphere*, 79 Ill. 187.

The unconditional appointment of a receiver to take charge of the property in an action based on an alleged fraudulent conveyance and bill of sale is not authorized, where the defendant is solvent and able to respond to any judgment which may be obtained against him by plaintiffs. *Turnipseed v. Kentucky Wagon Co.* (Ga.) 23 S.E. 84.

class of cases the receiver's right does not depend upon his succession to the title of the debtor, but upon the equitable right of the creditor to have set aside a conveyance, which, as to him, is invalid, but which is effectual as a cloud to prevent the application of the property to the satisfaction of the debt.¹

By the statute of 13 Eliz. Ch. 5, made perpetual by 29 Eliz. Ch. 5, all conveyances or other disposition of property, real or personal, made with the intention of defrauding creditors are declared to be null and void. This statute has been adopted in Maine, New Hampshire, Massachusetts, Maryland, Pennsylvania, Delaware, and Iowa, and re-enacted, in substance, in the other states. Under these statutes the rule is well-nigh universal that a transfer by a debtor to a creditor in payment of his claim, with the intention on the part of the former to hinder and delay his other creditors, the latter participating, is invalid as to such other creditors.²

A receiver in supplementary proceedings may attack as fraudulent a mortgage executed by a judgment debtor. *Ward v. Petrie*, 36 N. Y. Supp. 940.

The appointment of a receiver without notice in a creditors' action to reach property fraudulently transferred is authorized where the bill avers that the debtors are insolvent; that they have sold a large part of their goods to their mother in payment of a stipulated debt; that she has disposed of them; that the debtors have made an assignment of the remainder of their stock for creditors; that the assignee is insolvent and acting without bond and has preferred a stipulated claim for a large amount; and that the sale and transactions were, to the knowledge of the transferee and assignee, parts of a scheme to injure, delay, and defraud creditors. *Maxwell v. Peters Co.* (Ala.) 10 So. 419.

¹*Dunham v. Byrnes*, 36 Minn. 106; in such case there is no need that the receiver take possession of the property for this purpose, nor that he be in any way invested with the title.

Bostwick v. Menck, 40 N. Y. 383; *Wright v. Nostrand*, 94 N. Y. 31. The receiver may avoid a chattel mortgage given by the debtor on the ground that it is not given in accordance with the statute. *Farmers' Loan & T. Co. v. Minneapolis Engine & Mach. Works*, 35 Minn. 543.

It should be observed in this connection that the courts are slow to appoint a receiver upon an allegation of a fraudulent transfer, if the fraud is denied in the answer, and it is not shown that the assignee is insolvent, or that there is danger of loss or injury to the property. *Goodyear v. Betts*, 7 How. Pr. 187; *Pelzer v. Hughes*, 27 S. C. 408.

The rights of an assignee cannot be determined in the application for a receiver, particularly if the assignee is not a party. *Journey v. Brown*, 26 N. J. L. 111. "The property can only be recovered of him by a suit brought by the receiver, and in that suit he may be heard fully in his own defense."

²For an exhaustive discussion of this subject and particularly relative

Creditors having judgment liens may also attack as invalid, a mortgage given by a debtor in fraud of their rights, even though a receiver has been appointed.¹

(b) RULE AS TO EXECUTION.

This proceeding having for its primary purpose the reaching of property not otherwise accessible to ordinary common law writs, it follows as one of the fundamental principles of this branch of equity jurisdiction that if the plaintiff has an adequate remedy at law he cannot invoke the aid of a court of chancery.²

to the participation in the fraud by the vendee, see note to *Rice v. Wood* (Ark.) 31 L. R. A. 609.

¹*Gere v. Dibble*, 17 How. Pr. 31.

A court of equity has power to subject property which in fact is the property of the debtor, but is fraudulently standing in the name of another, to the payment of a judgment and to remove a fraudulent judgment which might stand as a cloud upon the title of a debtor. *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052; *Dockray v. Mason*, 48 Me. 178; *Hendricks v. Robinson*, 2 John. Ch. 283; *Edmeston v. Lyde*, 1 Paige, 637; *Beck v. Burdett*, 1 Paige, 305; *Cuyler v. Moreland*, 6 Paige, 273; *Feldenheimer v. Tressel*, 6 Dak. 265.

In reference to the matter of jurisdiction of the United States courts in creditor's proceedings, the equitable jurisdiction is not taken from such courts by reason of state legislation giving to creditors a remedy at law. *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052.

²*Durand v. Gray*, 129 Ill. 9; *Preston v. Colby*, 117 Ill. 477; *Dormueil v. Ward*, 108 Ill. 216; *Moshier v. Meek*, 80 Ill. 79; *First Nat. Bank v. Gage*, 79 Ill. 207; *Horner v. Zimmerman*, 45 Ill. 14; *McConnel v. Dickson*, 43 Ill. 109; *Heacock v. Durand*, 42 Ill. 230; *Newman v. Willetts*, 52 Ill. 98; *McNab v. Heald*, 41 Ill. 326; *Bigelow v. An-*

dress, 31 Ill. 322; *Bowen v. Parkhurst*, 24 Ill. 257; *Ishmael v. Parker*, 13 Ill. 324; *McDowell v. Cochran*, 11 Ill. 31; *Manchester v. McKee*, 9 Ill. 511; *Miller v. Davidson*, 8 Ill. 523; *Ballentine v. Beall*, 4 Ill. 203; *Stone v. Manning*, 3 Ill. 530; *Allright v. Herzog*, 12 Ill. App. 557; *Baxter v. Moses*, 77 Me. 465; *Howe v. Whitney*, 66 Me. 17; *Hamlin v. McGillicuddy*, 62 Me. 268; *Griffin v. Nitcher*, 57 Me. 270; *Corey v. Greene*, 51 Me. 114; *Webster v. Clark*, 25 Me. 318; *Taylor v. Bowker*, 111 U. S. 110, 28 L. ed. 368; *Bassett v. Orr*, 7 Biss. 296; *Board of Public Works v. Columbia College*, 84 U. S. 17 Wall. 521, 530, 21 L. ed. 687, 692; *Jones v. Green*, 68 U. S. 1 Wall. 332, 17 L. ed. 555; *Day v. Washburn*, 65 U. S. 24 How. 352, 16 L. ed. 712; *Stewart v. Fagan*, 2 Woods, 215; *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Miller v. Miller*, 7 Hun, 208; *Ballou v. Jones*, 13 Hun, 629; *Crippen v. Hudson*, 18 N. Y. 161; *Brinkerhoff v. Brown*, 4 John. Ch. 671; *McDermutt v. Strong*, 4 John. Ch. 687; *Williams v. Brown*, 4 John. Ch. 682; *Wiggins v. Armstrong*, 2 John. Ch. 144; *Hendricks v. Robinson*, 2 John. Ch. 290; *Beck v. Burdett*, 1 Paige, 305; *Payne v. Sheldon*, 63 Barb. 169; *Voorhees v. Howard*, 4 Abb. App. Dec. 503; *Parshall v. Tillou*, 13 How. Pr. 7; *Brooks v. Stone*, 19 How. Pr. 395; *Bailey v. Staley*, 5 Gill & J.

But the evidence usually required upon this subject has given rise to a great variety of decisions. The general doctrine may

432; *Brown v. Long*, 1 Ired. Eq. 190; *McNairy v. Eastland*, 10 Yerg. 310; *Preston v. Wilcox*, 38 Mich. 578; *Tyler v. Peatt*, 30 Mich. 63; *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200; *Pease v. Soranton*, 11 Ga. 83; *Cubbedge v. Adams*, 42 Ga. 124; *Peyton v. Lamar*, 42 Ga. 181; *Reese v. Bradford*, 18 Ala. 837; *Henderson v. McVay*, 32 Ala. 471; *Bassett v. St. Albans Hotel Co.* 47 Vt. 313; *Tappan v. Boane*, 11 N. H. 312; *Rasnbaut v. Mayfield*, 1 Hawks, 85; *Allen v. Montgomery*, 48 Miss. 106; *Brown v. Bank of Mississippi*, 31 Miss. 454; *Ragsdale v. Holmes*, 1 S. C. 91; *Turner v. Adams*, 46 Mo. 95; *Suydam v. Northwestern Ins. Co.* 51 Pa. 394; *May v. Greenhill*, 80 Ind. 124.

In *Bieder v. Douglas*, 85 Ill. App. 124, it is held that proof of the existence of a judgment and return of execution unsatisfied are jurisdictional facts, and in the absence of proof on this subject no relief can be granted on a creditor's bill. Cf. *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 108.

In the case of *State v. Foot*, 27 S. C. 340, where suit was instituted to set aside and vacate a mortgage and an assignment it was held, on the authority of *Burch v. Bramley*, 20 S. C. 508, that an allegation of the return of an execution *nulla bona* is not required. In a similar proceeding it was held in *Hancock v. Wooten*, 107 N. C. 9, 11 L. R. A. 466, that under the present practice in North Carolina, neither a judgment nor execution is necessary to sustain the proceeding. Cf. *Dawson Bank v. Harris*, 84 N. C. 206.

In the case of *Newman v. Willetts*, 52 Ill. 98, it was held that in the ordinary creditor's bill, the issuing and return of an execution no property found

are prerequisites. Yet where the proceeding is merely to set aside a fraudulent conveyance, constituting an obstruction to a judgment, the issuing and return of an execution on such judgment are not prerequisites, but that it must appear that the judgment is an existing lien.

The power of a court of equity to lend its aid where the common law remedies have proved ineffectual is not without limitations, however, as will be seen in *Thompson v. Allen County*, 115 U. S. 550, 29 L. ed. 472. In this case judgment was obtained against a county, executions issued and returned *nulla bona*; under mandamus proceedings a tax was levied to pay the judgment, but the tax collector whose duty it was to collect the taxes refused to qualify, whereupon a receiver was prayed for to collect the taxes in lieu of the collector. The court say: "By inadequacy of the remedy at law is here meant not that it fails to produce the money—that is a very usual result in the use of all remedies—but that in its nature or character it is not fitted or adapted to the end in view."

And in a similar proceeding in *Rees v. Watertown*, 86 U. S. 19 Wall, 107, 22 L. ed. 72, the court say: "The remedy (mandamus) is in law and theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. . . . A court of equity cannot, by avowing there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon estab-

be stated as follows: That the issuance of an execution and a return thereof *nulla bona* are essential to the commencement of a proceeding in the nature of a creditor's bill or supplementary proceeding.¹ To this general rule there are many exceptions. Thus it has been held—

(1) That where the plaintiff obtains a lien upon the debtor's real estate by attachment, he may maintain a creditor's bill by virtue of such lien, for the purpose of removing or setting aside fraudulent conveyances thereof, without alleging and showing the issuance of an execution, and the return thereof, no property found.²

(2) Where it is alleged and shown that the judgment debtor is insolvent, and that the issuance of an execution and return thereon *nulla bona* would necessarily be of no practical utility, it may be dispensed with.³

lished principles not only, but through established channels." The refusal of the court of equity through its receiver to collect taxes, in the foregoing and other cases, is based upon the ground that the remedy of the common law courts to enforce the collection of taxes is adequate and complete. The difficulty is that neither a common law nor chancery court has power to fill a vacancy in office of tax collector. Cf. *Heine v. Madison & Carrol Board of Levee Comrs.* 86 U. S. 19 Wall. 655, 22 L. ed. 223; *Taylor v. Secor* ("State R. Tax Cases") 92 U. S. 575, 23 L. ed. 663; *Barkley v. Madison & Carrol Board of Levee Comrs.* 93 U. S. 258, 23 L. ed. 893; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *McLean County Precinct v. Deposit Bank*, 81 Ky. 254.

¹See cases under preceding note. *Tomlinson & W. Mfg. Co. v. Shatto*, 34 Fed. Rep. 380. The positive affidavit that no execution has been returned is a sufficient answer to the motion. *Wright v. Strong*, 3 How. Pr. 112; *Ahlhauser v. Doud*, 74 Wis. 400.

²*Francis v. Lawrence*, 48 N. J. Eq. 508; *Hunt v. Field*, 9 N. J. Eq. 36;

Williams v. Michener, 11 N. J. Eq. 520; *Robert v. Hodges*, 16 N. J. Eq. 299; *Cocks v. Varney*, 45 N. J. Eq. 72; *Dawson v. Sims*, 14 Or. 561; *Conroy v. Woods*, 18 Cal. 626. There will be noticed a direct conflict of authority upon this point in the cases of *Thurber v. Blanck*, 50 N. Y. 80, and *Mechanics Bank v. Dakin*, 51 N. Y. 519. Cf. *Gross v. Daly*, 5 Daly, 542; *Castle v. Lewis*, 78 N. Y. 187; *Anthony v. Wood*, 96 N. Y. 185; *Smith v. Longmire*, 1 American Insolv. Rep. 426.

³*Turner v. Adams*, 46 Mo. 95; citing *Merry v. Freeman*, 44 Mo. 518; *McDowell v. Cockran*, 11 Ill. 31; *Bay v. Cook*, 31 Ill. 336; *Postlewait v. Howes*, 8 Iowa, 366.

A creditor may proceed in equity to reach an equitable estate before judgment. *Doolittle v. Bridgman*, 1 G. Greene, 265; *Thompson v. Brown*, 4 John. Ch. 630; *Sweny v. Ferguson*, 2 Blackf. 129; *Ripper v. Glancey*, 2 Blackf. 356; *Steele v. Hoagland*, 39 Ill. 264; *White v. Russell*, 79 Ill. 155; *Eads v. Mason*, 16 Ill. App. 545; *Russell v. Clark*, 11 U. S. 7 Cranch, 89, 3 L. ed. 279.

(3) Where the judgment debtor has nothing except real estate which has been fraudulently conveyed, proof of the issuance of an execution is not necessary.¹

(4) Where the object of the bill is the removal of a fraudulent conveyance of property upon which a levy has been made, an execution returned is not required.²

(5) Where it is shown that the judgment debtor has absconded so that a judgment cannot be had against him, creditors may proceed at once by a proceeding in equity.³

(6) Where the proceedings are against an insolvent's estate no execution can issue and a bill may be filed in the first instance.⁴

(7) Where it appears that the judgment debtor made no objection on account of the failure to issue execution, and where it further appears that if execution had been issued and returned *nulla bona* it would have been an idle ceremony.⁵

And it may be remarked in this connection that the person who is entitled to object because of no execution having been issued and returned unsatisfied is the debtor and if he acquiesces in the proceeding for a considerable space of time it will be construed as a waiver of the objection.⁶ It is no defense to the appointment of a receiver in a creditor's suit that the judgment was confessed to secure a contingent liability which is not matured; the court will not go behind the judgment and execution.⁷ Nor is it a defense to the appointment of a receiver, that a motion is pending for leave to amend the bill, providing the defect is not fatal, nor is the pendency of a motion to dissolve the injunction.⁸

¹*Payne v. Sheldon*, 63 Barb. 169; *Shaw v. Dwight*, 27 N.Y. 244; *Brinkerhoff v. Brown*, 4 John. Ch. 671; *Cornell v. Radway*, 22 Wis. 260; *Cook v. Johnson*, 12 N. J. Eq. 51; *Croone v. Bivins*, 2 Head. 339; *Thurmond v. Reese*, 8 Ga. 449; *Sanderson v. Stockdale*, 11 Md. 563.

²*Botsford v. Beers*, 11 Conn. 369; *Logan v. Logan*, 22 Fla. 561; *Binnie v. Walker*, 25 Ill. App. 82; *Weightman v. Hatch*, 17 Ill. 281; *Beach v. Boston*, 45 Ill. 341; *Newman v. Willette*, 52 Ill. 101; *Fusze v. Stern*, 17 Ill. App. 429.

³*Merchants' Nat. Bank v. Paine*, 18

R. I. 592; *Scott v. McMullen*, 1 Litt. 302; *Peay v. Morrison*, 10 Gratt. 144; *Kipper v. Glancey*, 2 Blackf. 356; *O'Brien v. Coulter*, 2 Blackf. 421; *Farrar v. Haselden*, 9 Rich. Eq. 381; *Pendleton v. Perkins*, 49 Mo. 565; *Pope v. Solomon*, 36 Ga. 541.

⁴*Bay v. Cook*, 31 Ill. 336; *McDowell v. Cochrane*, 11 Ill. 30.

⁵*Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694.

⁶*Brown v. Lake Superior Iron Co.* 134 U. S. 530, 33 L. ed. 1021.

⁷*Lent v. McQueen*, 15 How. Pr. 313.

⁸*Barnard v. Darling*, 1 Barb. Ch. 76.

Neither is the appointment barred by an assignment for the benefit of creditors where such assignment is made after the commencement of the supplementary proceeding;¹ nor is it a defense that the real estate of the debtor is heavily incumbered, and that an execution cannot be satisfied in whole or in part. A defect in the return of an execution is cured by the appearance of the defendant, who without objection submits to an examination, but more especially so if it appears that the debtor has not been injured by the defective return.²

Notwithstanding the exceptions above noted the rule is that it is necessary, as we have seen, that the plaintiff shall have recovered a judgment against his debtor in a court of competent jurisdiction, and that such judgment is in full force and unsatisfied. A judgment in favor of the creditor and against the debtor is a necessary prerequisite to the commencement of a proceeding of this nature, except in a few cases noted, and except where the statute has otherwise provided; in other words a chancery court will not take jurisdiction except upon the application of a judgment creditor.³

¹*Tomlinson & W. Mfg. Co. v. Shatto*, 34 Fed. Rep. 380.

²*Baker v. Herkimer*, 43 Hun, 86.

³*Adee v. Bigler*, 81 N. Y. 349; *Estes v. Wilcox*, 67 N. Y. 264; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Beardsley Scythe Co. v. Foster*, 36 N. Y. 565; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *McElwain v. Willis*, 9 Wend. 548; *Wiggins v. Armstrong*, 2 John. Ch. 144 (injunction); *Bayard v. Fellows*, 28 Barb. 451; *Dodge v. Pyrotusite Manganese Co.* 69 Ga. 665; *Johnson v. Farnum*, 56 Ga. 144; *Clark v. Raymond*, 84 Iowa, 251; *Durand v. Gray*, 129 Ill. 9; *Preston v. Colby*, 117 Ill. 477; *Dormeuil v. Ward*, 108 Ill. 216; *McConnel v. Dickson*, 43 Ill. 109; *Rich v. Levy*, 16 Md. 74; *Hubbard v. Hubbard*, 14 Md. 356; *Nusbaum v. Stein*, 12 Md. 315; *Uhl v. Dillon*, 10 Md. 500; *Rhodes v. Cousins*, 6 Rand. (Va.) 188

(injunction); *May v. Greenhill*, 80 Ind. 124.

It has been supposed that the cases of *Rosenberg v. Moore*, 11 Md. 376; *Morrison v. Shuster*, 1 Mackey, 190, and *Watchtel v. Wilde*, 58 Ga. 50, are contrary to the doctrine of the text, but it will be seen by an examination of the cases that two of them were to set aside fraudulent transfers, and the question of the necessity of a judgment was not raised or discussed by the court, and in the other case judgment was reserved until a hearing upon the merits could be had. The same principle is involved in cases where before the rendition of a judgment an injunction is sought against a debtor to prevent a disposition of his property pending the common law suit and in such cases it is held that a judgment in case of real estate and a judgment and execution in case of

§ 149. Jurisdiction in matters of assignment.

(a) Closely related to the matter of fraudulent conveyances, is the matter of fraudulent assignments intended by the debtor to hinder and delay his creditors in the collection of their debts, and therefore voidable as to them in a proper proceeding instituted for such purpose.¹ But in attacking an assignment on the ground

personal property are necessary to give a court of equity jurisdiction to grant an injunction. These cases are based upon the doctrine that until the creditor has established his title he has no right to interfere with the debtor's disposition of his property; that unless he has some claim upon the property of the debtor he has no concern with his frauds. *Rhodes v. Cousins*, 6 Rand. (Va.) 188; citing *Angell v. Draper*, 1 Vern. 899; *Shirley v. Watts*, 3 Atk. 200; *Bennet v. Musgrove*, 2 Ves. Sr. 51; *Balch v. Wastall*, 1 P. Wms. 451; *Wiggins v. Armstrong*, 2 John. Ch. 144; *Chamberlayne v. Temple*, 2 Rand. (Va.) 884. Cf. *Blondheim v. Moore*, 11 Md. 365; *S. C.* 11 Md. 376, under title of *Rosenberg v. Moore*; *Phelps v. Foster*, 18 Ill. 809; *Young v. Frier*, 9 N. J. Eq. 465. In this case a creditor at large sought the aid of a chancery court to restrain a judgment creditor of a firm from proceeding under his judgment against the property of an individual member of such firm and it was held that without judgment it could not be done. Overruling the case of *Blackwell v. Rankin*, 7 N. J. Eq. 153, which was said to be based on 1 Story, Eq. 678; 2 Story, Eq. 1253, and *Ketchum v. Durkee*, 1 Barb. Ch. 480, and *Waters v. Taylor*, 2 Ves. & B. 299. So long as the final judgment remains unsatisfied the action is a "cause or matter pending" within the meaning of the Judicature Act of 1873, and the court may appoint a receiver, and a new action is not required. *Salt v. Cooper*, L. R. 16

Ch. Div. 544; *Re Peace and Waller*, L. R. 24 Ch. Div. 405; *Smith v. Cowell*, L. R. 6 Q. B. Div. 75.

¹In *Connah v. Sedgwick*, 1 Barb. 210, a creditor's bill was filed to set aside an alleged fraudulent assignment. After the failure an assignment was made of all his property by the judgment debtor to his father who was made a preferred creditor, and was also insolvent, no change of possession being made. The court held that under the statute unless there was a change of possession continuous the assignment was presumed to be fraudulent and void as to creditors, and said: "If there is any aspect I am bound to look upon it as void nothing can be more right or consonant to the well established practice of this court than on such a bill as this is to direct the appointment of a receiver to take charge of the property to abide the result of the inquiry whether it was actually fraudulent." And see further discussion as to what constitutes a change of possession. *Shainwald v. Lewis*, 7 Sawy. 148. And see this case for general discussion of the scope and purpose of creditor's bills.

The appointment of a receiver, by a decree in favor of judgment creditors declaring an assignment for creditors void, to sell the property and apply the proceeds to the payment of the judgments and distribute the balance among the other creditors, is not necessary or proper. *Middleton v. Taber* (S. C.) 24 S. E. 282.

of fraud the court will not appoint a receiver where the fraud is denied by the answer, and it is not shown that the assignee is insolvent or there is otherwise danger of loss.¹ As to what are fraudulent assignments it may in general terms be stated as follows: (1) where the instrument provides for the debtor continuing business; (2) where the debtor reserves to himself a benefit, as in the disposition of the property; (3) provisions for the possession to remain in the debtor; (4) provisions for the payment of individual debts out of partnership assets; (5) omission of assets if intentional; (6) including fictitious liabilities.²

(b) And a receiver may be appointed where the assignment is free from fraud in cases (1) where the assignee fails to take possession of the property, or fails or refuses to do anything towards carrying out the object of the trust,³ or (2) is guilty of gross mismanagement of the trust property or funds.⁴ Where an assignment is set aside as fraudulent and void as to creditors, and the debtor and assignee transfer the property to the receiver appointed in a creditor's proceeding upon the order of court the title to the real estate thereby becomes vested in the receiver and is not subject to levy and sale under a subsequent judgment.⁵

¹*Pelzer v. Hughes*, 27 S. C. 408.

²See Wait on Fraudulent Conveyances and Creditor's Bills, § 845, 2d ed.; also the following cases cited: (1) *Holmes v. Marshall*, 78 N. C. 262; (2) *Cheatham v. Hawkins*, 76 N. C. 335; *Bigelow v. Stringer*, 40 Mo. 195; *Barney v. Griffin*, 2 N. Y. 365; *Leitch v. Hollister*, 4 N. Y. 211; *Mackie v. Cairnes*, 5 Cow. 547; *Harris v. Summer*, 2 Pick. 129; *Frank v. Robinson*, 96 N. C. 32; (3) *Billingsley v. Bunce*, 28 Mo. 547; *Reed v. Pelletier*, 28 Mo. 173; *Brooks v. Wisner*, 20 Mo. 508; *Stanley v. Bunce*, 27 Mo. 269; *Cheatham v. Hawkins*, 76 N. C. 335; *Harman v. Hoskins*, 56 Miss. 142; *Joseph v. Levi*, 58 Miss. 843; (4) *Wilson v. Robertson*, 21 N. Y. 587; *Schiele v. Healy*, 61 How. Pr. 73; *Platt v. Hunter*, 11 N. Y. Week. Dig. 300; but see *Crook v. Rindakopf*, 105 N. Y. 476; (5) *Probst v. Welden*, 46 Ark. 409;

Shultz v. Hoagland, 85 N. Y. 464; *Waverley Nat. Bank v. Halsey*, 57 Barb. 249; *Craft v. Bloom*, 59 Miss. 69; (6) *Talcott v. Hess*, 81 Hun. 282. Cf. *Pierce v. Brewster*, 32 Ill. 268; *Whipple v. Pope*, 33 Ill. 334; *Gardner v. Commercial Nat. Bank*, 95 Ill. 298. ³*Suydam v. Dequindre*, Harr. Ch. 347.

⁴*Jones v. Dougherty*, 10 Ga. 273.

Where a bankrupt concealed from his assignee a valuable claim and bid off all his rights and property at a sale thereof for a nominal sum, a creditor's bill was held properly brought by a creditor, after the assignee's death, in behalf of all the creditors, to reach the fund awarded in payment of the claims. *Clark v. Clark*, 58 U. S. 17 How. 315, 15 L. ed. 77.

⁵*Chautauque County Bank v. White*, 6 N. Y. 236.

§ 150. Supplementary proceeding.

Closely analogous to a creditors bill, and as a substitute therefor, so far as the discovery of property and the application of the same is concerned is the statutory proceeding, in most of the states denominated supplementary proceedings or proceedings in aid, etc., and as a rule the old chancery practice governs this statutory proceeding, unless otherwise provided by the statute. In many of the states the proceedings are less formal and less complicated than under the original chancery practice under a creditor's bill.¹ In this class of cases the receiver represents the creditors and may impeach the debtor's fraudulent transfers,² to

¹*Pacific Bank v. Robinson*, 57 Cal. 530; *McCullough v. Clark*, 41 Cal. 298; *Mason v. Weston*, 29 Ind. 561; *Becker v. Torrance*, 31 N. Y. 681; *Pope v. Cole*, 64 Barb. 406, affirmed in 55 N. Y. 124; *Tudes v. Hood*, 29 Kan. 49; *Atchison Board of Education v. Scofield*, 13 Kan. 17; *Flint v. Webb*, 25 Minn. 263; *Kennesaw Mills Co. v. Walker*, 19 S. C. 104; *Graham v. La Crosse & M. R. Co.* 10 Wis. 459; *Smith v. Weeks*, 60 Wis. 94; *Clark v. Bergenthal*, 53 Wis. 108; *Kellogg v. Collier*, 47 Wis. 649; *Barker v. Dayton*, 23 Wis. 387; *Allen v. Tritch*, 5 Colo. 232; *Coates Bros. v. Wilkes*, 92 N. O. 376. And see *People, Fitch, v. Mead*, 29 How. Pr. 860; *Spencer v. Ouyler*, 9 Abb. Pr. 382; *Barnes v. Morgan*, 3 Hun, 708; *Billings v. Stewart*, 4 Dem. 269.

It is held in New York that the commencement of the creditor's proceeding gives the creditor at once a lien upon the equitable assets of the debtor. *Lynch v. Johnson*, 48 N. Y. 27; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Brown v. Nichols*, 42 N. Y. 26; *Davenport v. Kelly*, 42 N. Y. 193.

The filing of a bill and the service of process creates a lien. *Miller v. Sherry*, 69 U. S. 2 Wall. 237, 17 L. ed. 827; *Freedman's Sav. & T. Co. v. Earle*, 110 U. S. 710, 28 L. ed. 301.

²*Bostwick v. Menck*, 40 N. Y. 383; *Porter v. Williams*, 9 N. Y. 142; *Dal-lard v. Taylor*, 1 Jones & S. 496; *Osgood v. Laytin*, 48 Barb. 468; S. C. affirmed 5 Abb. Pr. N. S. 9; *Hamlin v. Wright*, 23 Wis. 492; *Barton v. Hosner*, 24 Hun, 469; *Underwood v. Sutcliffe*, 77 N. Y. 62; *Dunham v. Byrnes*, 38 Minn. 106; *Miller v. Mackenzie*, 29 N. J. Eq. 291. But see *Higgins v. Gillesheimer*, 26 N. J. Eq. 308.

A receiver will not be appointed for the purpose of collecting costs in supplementary proceedings which have not been awarded or allowed, where the judgment creditor has without the knowledge of his attorney settled the matter in full. *Paterson Bros. v. Goorley*, 14 Misc. 56.

A receiver in supplementary proceedings is not entitled to the proceeds of insurance upon exempt property because the debtor once expressed his willingness to apply the money on the judgment, where he subsequently claims his legal rights. *Bliss v. Raynor*, 91 Hun, 250.

A receiver in supplementary proceedings cannot be required at the instance of his attorney to bring an action against the county clerk for official misconduct in failing to furnish copies of papers on file in his

such extent as to satisfy the debts of the creditors he represents.¹ But it must not be understood that the receiver by his appointment becomes vested with the title to property fraudulently conveyed so that the court in a summary manner may put him in possession. A suit is necessary for that purpose,² and where an assignee in bankruptcy has been appointed the assignee and not the receiver is the proper person to institute such proceedings.³

§ 151. Necessity of officers retaining execution, statutory period.

(a) WHEN REQUIRED.

As to the necessity of the sheriff holding the execution for the full lifetime given by the statute the decisions are by no means uniform. Some of them hold that the sheriff must hold the execution the full sixty days, or other time allowed for a return, before a return thereon can be made a basis for a creditor's bill or supplementary proceeding, and are based upon the doctrine that plaintiff must have exhausted his legal remedies before invoking the aid of a court of chancery, or other court exercising chancery jurisdiction.⁴

office, to enable such attorney to obtain pay for his services, where no action has been commenced so as to give the attorney a lien on such papers under N. Y. Code Civ. Proc. § 66. *Millis v. Pentelov*, 92 Hun, 284.

¹*Bostwick v. Menck*, 40 N. Y. 883; *Manley v. Rassiga*, 13 Hun, 290.

²*Bostwick v. Menck*, 40 N. Y. 884.

³*Olney v. Tanner*, 18 Fed. Rep. 636; *Glenny v. Langdon*, 98 U. S. 20, 25 L. ed. 43; *Trimble v. Woodhead*, 102 U. S. 647, 26 L. ed. 290; *Moyer v. Dewey*, 103 U. S. 801, 26 L. ed. 394.

But the right of possession of a receiver is superior to that of an assignee in bankruptcy subsequently appointed. *Skip v. Harwood*, 3 Atk. 564; *Judd v. Bankers' & M. Teleg. Co.* 31 Fed. Rep. 182.

⁴*McElwain v. Willis*, 9 Wend. 548;

Beck v. Burdett, 1 Paige, 805; *Pudney v. Griffiths*, 6 Abb. Pr. 211; *Spencer v. Cuyler*, 17 How. Pr. 157, 9 Abb. Pr. 382; *Ritterband v. Maryatt*, 12 N. Y. Leg. Ob. 158; *Nagle v. James*, 7 Abb. Pr. 234; *Cassidy v. Meacham*, 3 Paige, 311; *Williams v. Hogeboom*, 8 Paige, 469; *Platt v. Cadwell*, 9 Paige, 886; *Smith v. Thompson*, Walk. Ch. 1; *Williams v. Hubbard*, Walk. Ch. 28; *Beach v. White*, Walk. Ch. 495; *Thayer v. Swift*, Harr. Ch. 430; *Steward v. Stevens*, Harr. Ch. 169; *Adams v. Bove*, 12 Abb. N. C. 322; *Wright v. Nostrand*, 94 N. Y. 31. And see *Palmer v. Colville*, 63 Hun, 536.

Under New York Code. *Engle v. Bonneau*, 2 Sandf. 679; *Livingston v. Cleveland*, 5 How. Pr. 396; *Tyler v. Whitney*, 12 Abb. Pr. 465; *Fenton v. Flagg*, 24 How. Pr. 499; *Farguharson v. Kimball*, 9 Abb. Pr. 385n;

(b) WHEN NOT REQUIRED.

On the other hand it has been held that the officer having the execution in his hands need not retain the same the full statutory period before making his return thereon in order to constitute the foundation of a creditors' bill or supplementary proceedings, and this doctrine is maintained upon the presumption that the sheriff or other officer has done his entire official duty in searching for property of the judgment debtor.¹

It will be apparent that the return of the execution by the officer within the statutory period, and making such return the basis of a creditor's bill or supplementary proceeding, on the presumption that the officer has used due diligence in searching for property may be, and often is, the merest fiction, and is using the court and its process for the purpose of wresting from an unfortunate debtor the possession and income of his property by means

Sperling v. Levy, 10 Abb. Pr. 426.

If there is no fraud or collusion, it may be presumed the officer did his duty. The return of the sheriff can only be impeached in a direct proceeding, and not collaterally. *Methodist Book Concern & Co. v. Hudson*, 1 How. Pr. N. S. 517 (see rules of court).

One judgment debtor on whose property an execution has been levied which property it is alleged had been fraudulently conveyed, will not be permitted to contend that the execution is void because issued against only one of several judgment debtors. *Flanders v. Batten*, 50 Hun, 542.

¹*Spencer v. Cuyler*, 17 How. Pr. 157; *Hutchinson v. Brand*, 9 N. Y. 208; *Farquaharson v. Kimball*, 18 How. Pr. 33; *Livingston v. Cleveland*, 5 How. Pr. 396; *Tyler v. Whitney*, 12 Abb. Pr. 465; *Fenton v. Flagg*, 24 How. Pr. 499; *Field v. Chapman*, 15 Abb. Pr. 484; *First Nat. Bank v. Dering*, 8 N. Y. Week. Dig. 261; *Tomlinson & W. Mfg. Co. v. Shatts*, 34 Fed.

Rep. 380; *Sperling v. Levy*, 10 Abb. Pr. 426; *Tyler v. Willis*, 33 Barb. 327; *Renand v. O'Brien*, 35 N. Y. 99. But see *Williams v. Hogeboom*, 8 Paige, 469; *Whitehead v. Hellen*, 74 N. C. 679; *Bowen v. Parkhurst*, 24 Ill. 257; *Williams v. Ives*, 49 Ill. 512; *First Nat. Bank v. Gage*, 79 Ill. 207; *Russell v. Chicago Trust & Sav. Bank*, 139 Ill. 538, 17 L. R. A. 345.

Where the execution is returned on the same day of its issuance by order of the plaintiff's attorneys, it cannot form the basis of a creditor's bill and the receiver will be discharged. *Stirren v. Jewett*, 63 Ill. App. 55; *Scheubert v. Honel*, 50 Ill. App. 597.

And while the execution may be returned before the 90 days and become the foundation of a creditor's bill it must be done upon the responsibility of the sheriff, and not by direction of the plaintiff. It must be returned by reason of the sheriff's inability to find property whereon to levy. *Durand v. Gray*, 129 Ill. 9; *Scheubert v. Honel*, 152 Ill. 313.

of a receivership. Hence it is that courts have exercised a judicious care and circumspection over proceedings of this nature, and if it appeared that the execution was returned before its lifetime had expired, through the solicitation and at the request of plaintiff or his attorney, and that no attempt had been made to discover property, or effect a levy, or demand property for the purpose of satisfying the execution, then in such case the court has treated the return of the sheriff as not in fact his return and has, upon motion, set aside the supplementary proceedings.¹ Where the sheriff's return is dictated by the plaintiff's attorney and is so shown thereby it is not a sufficient foundation for supplementary proceedings.²

§ 152. Practice in code states.

Under many of the codes of procedure the causes for which the court may appoint a receiver are specifically stated, to which it is not deemed essential to refer in this connection. It was for-

¹*Pudney v. Griffiths*, 15 How. Pr. 410; *Nagle v. James*, 7 Abb. Pr. 284; *Ritterband v. Maryatt*, 12 N. Y. Leg. Obs. 158; *Albany City Bank v. Door*, Walk. Ch. 317.

If, however, it appears that the officer has in good faith made an ineffectual effort to find property then the proceeding will be upheld. *Whitehead v. Hellen*, 74 N. C. 679; *Hart v. Stearns*, 4 N. Y. Week. Dig. 540.

Some doubt has been entertained, however, as to the power of the court to go back of the sheriff's return and enquire into the good faith of his acts in the matter, discovering property, levying thereon and returning the execution *nulla bona* in supplementary proceeding, such being in the nature of a collateral attack upon an official act of an officer of the court. *Sperling v. Levy*, 10 Abb. Pr. 426; *Owen v. Dupignac*, 9 Abb. Pr. 180; *Methodist Book Concern & Co. v. Hudson*, 1 How. Pr. N. S. 517; *Browning v. Hanford*, 5 Denio, 586; *Putnam v.*

Man, 8 Wend. 202; *Wheeler v. Lampman*, 14 John. 481; *Flint v. Webb*, 25 Minn. 263.

These authorities, as a rule, hold that the return of the sheriff must be attacked in a direct proceeding for such purpose by the judgment debtor.

Where there is collusion between the creditor and debtor for the purpose of enabling the latter to carry on his business without interference on the part of creditors it is a fraud upon the rights of creditors, and upon an intervening petition by judgment creditors setting up the fraud, the original bill was dismissed for want of equity and receiver discharged. *Stirlen v. Jewett*, 63 Ill. App. 55.

²*Marx v. Spaulding*, 35 Hun, 478. And in Wisconsin the sheriff's return on its face must show diligent search for real and personal property subject to levy and sale and a mere return unsatisfied is not sufficient. *Re Remington*, 7 Wis. 643. But see *Second Ward Bank v. Upmann*, 12 Wis. 499.

merly the practice under creditor's bills to appoint a receiver almost as a matter of course and then by discovery or otherwise proceed to ascertain if the debtor had property that should be applied towards the satisfaction of his debts. Under the modified and summary proceedings in New York and other code states, the more reasonable practice prevails of discovering property first and then appointing a receiver, and where no property is discovered subject to the payment of debts no receiver will be appointed.¹ Where a creditor's bill is filed against the estate of a deceased debtor it is necessary to allege and prove the insufficiency of the personal estate to pay debts,² but where the estate is sufficient to pay debts a receiver of the rents and profits will not be appointed.

§ 153. Appointment of receiver, order, duties, etc.

The appointment of a receiver in this class of proceedings, like the appointment in general, rests in the sound judicial discretion of the court, under the statutory provisions, and the practice of the court, upon notice given to the debtor and those interested in the property, or their appearance. The order should receive special care and be drawn with reference to the object or purpose of the receivership, having reference to the nature and character of the property involved. The general duties imposed upon the receiver, and the general rules regarding the regularity of the appointment, and the methods of attacking the same, are equally applicable to this class of receiverships; and so with reference to the bond and sureties of the receiver, as well as the general principles governing the selection of a receiver, his powers, duties, functions, and liabilities.

The receiver's title is in all respects similar to the receiver's title in other proceedings of a general nature, and is subject to the same limitations and restrictions, as to previous liens, exemptions, possession, trust relationships, etc.

¹See Hoffman, Prov. Rem. pp. 523, 524, 525; but see *Second Ward Bank v. Upmann*, 12 Wis. 499.

²*Sanders v. Christie*, 1 Grant, Ch.

(Ont.) 137; *McKaig v. James*, 66 Md. 588. It is otherwise if there is a strong probability of the estate being insufficient.

§ 154. Receiver's powers in supplementary proceedings.

Under creditors' bills and supplementary proceedings the receiver becomes vested with the debtor's assets and equitable interests without conveyance or assignment,¹ and inasmuch as in this proceeding he is the representative of the creditors he may impeach and set aside the fraudulent transfers of the debtor, and thereby subject the property to the payment of his debts.² In general, it may be said that the filing of a creditor's bill and the service of process creates an equitable lien upon the effects of a judgment debtor, and is in effect an equitable levy.³ Before the receiver is authorized to enter upon the duties

¹ *Bostwick v. Menck*, 40 N. Y. 383; *Cooney v. Cooney*, 65 Barb. 524; *Porter v. Williams*, 9 N. Y. 142; and this, too, whether the property is in the debtor's hands or in the hands of another; but this right only extends to such property as is not exempt from execution. *Hudson v. Plets*, 11 Paige, 180; *Andrews v. Rowan*, 28 How. Pr. 126; *Tillotson v. Wolcott*, 118 N. Y. 190. But see *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Moak v. Coats*, 33 Barb. 498; cf. *Manning v. Evans*, 19 Hun, 500; *Wing v. Dissé*, 15 Hun, 190; *Hayes v. Buckley*, 53 How. Pr. 173; *Harrison v. Maxwell*, 44 N. J. L. 816.

² *Bostwick v. Menck*, 40 N. Y. 383. But his right only extends to so much of the debtor's property so fraudulently assigned as will be sufficient to satisfy the creditor or creditors whom he represents. Cf. *Porter v. Williams*, 9 N. Y. 142; *Dollard v. Taylor*, 1 Jones & S. 496; *Gillet v. Moody*, 3 N. Y. 479; *Leavitt v. Palmer*, 3 N. Y. 19; *Brouwer v. Hill*, 1 Sandf. 629; *Hyde v. Lynde*, 4 N. Y. 392; *Underwood v. Sulciffe*, 77 N. Y. 58 (reversing 10 Hun, 453). While the receiver has power to institute proceedings to set aside fraudulent transfers of property made by the debtor, yet he does so as the representative of the creditor or

creditors at whose instance he has been appointed, and in so doing he has no greater power than such creditors would have were proceedings instituted by them, and if the creditors have waived the frauds by an affirmation of the contract, as in case of a suit thereon, the receiver cannot attack the transaction as fraudulent. *Kennedy v. Thorp*, 51 N. Y. 174 (reversing 2 Daly, 258); cf. *Parish v. Murphree*, 54 U. S. 13 How. 99, 14 L. ed. 67; *Savage v. Murphy*, 34 N. Y. 508; *Walter v. Lane*, 1 McArthur. 275.

³ *Miller v. Sherry*, 69 U. S. 10 Wall. 287, 17 L. ed. 827, citing *Bayard v. Hoffman*, 4 John. Ch. 450; *Beck v. Burdett*, 1 Paige, 308; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Corning v. White*, 2 Paige, 567; *Edgell v. Haywood*, 3 Atk. 352; *Tilford v. Burnham*, 7 Dana, 110.

An execution creditor can only come into a court of equity to enforce his judgment against property not capable of being reached at law; but where the debtor has mortgaged his property and has only an equitable interest remaining, the creditor may have a receiver of the rents and profits of the debtor's land, subject to the rights of the prior incumbrances, but not of the debtor's business (theatre). *Cadogan v. Lyris*

of his office and take control of the debtor's assets he must give bond as required.¹ When he has done so it has been held that the court has power to compel the debtor to convey to the receiver all the real estate owned by him situated without the state, as well as personal property.² When property of the judgment debtor is in the hands of a third person, under a valid transfer, or where the debtor has placed on such property a *bona fide* lien or incumbrance, the receiver's possession is subject thereto, or in other words, as to such property the receiver succeeds to such rights only in such property as the judgment debtor had at the date of his appointment.³ If the receiver desires to attack the title to property held by a third person he must bring an action for that purpose, making defendants to such action such persons as claim to have an interest therein.⁴ There are certain interests of the judgment debtor in property that he may have in his possession at the time of the receiver's appointment that do not vest in the receiver, such as property in which the debtor has the mere naked possession,⁵ or where he holds it as trustee, or which is exempt from levy and sale,⁶ or after-acquired property of the debtor.⁷ Under the general rule the receiver's title relates back to the date of his appointment, and the same rule applied

Theatre, 7 Rep. 594 [1894] 3 Ch. 338, 63 L. J. Ch. 775, 71 L. T. 8.

¹ *Voorhees v. Seymour*, 26 Barb. 569; *Banks v. Potter*, 21 How. Pr. 469; *Conger v. Sands*, 19 How. Pr. 8.

² *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Bunn v. Fonda*, 2 N. Y. Code Rep. 70; cf. *Steele v. Sturges*, 5 Abb. Pr. 442; but see *contra*, *Amy v. Manning*, 149 Mass. 487, as to choses in action in a foreign jurisdiction. It is also held that neither in England nor in Massachusetts is it within the general powers of a court of equity to compel an assignment of the debtor's property or his choses in action.

³ *Voorhees v. Seymour*, 26 Barb. 585; *Gardner v. Smith*, 29 Barb. 68. If a mortgagee is rightfully in the possession of mortgaged chattels the re-

ceiver succeeds only to the right of redemption and not the right of possession. *Campbell v. Fish*, 8 Daly, 162.

⁴ *Wright v. Nostrand*, 94 N. Y. 31.

⁵ *Gardner v. Smith*, 29 Barb. 68.

⁶ *Hancock v. Sears*, 98 N. Y. 79; *Finnin v. Malloy*, 1 Jones & S. 382; *Cooney v. Cooney*, 65 Barb. 524; *Tillotson v. Wolcott*, 48 N. Y. 188; *Campbell v. Foster*, 85 N. Y. 361; *Graff v. Bonnett*, 81 N. Y. 9; *Scott v. Nevins*, 6 Duer, 672; *Underwood v. Sutcliffe*, 77 N. Y. 58.

⁷ *Graff v. Bonnett*, 25 How. Pr. 470; *Genet v. Foster*, 18 How. Pr. 50; *Merritt v. Sawyer*, 6 Thomp. & C. 160. Nor to the wages of the debtor for personal services, *Howell v. McDowell*, 47 N. J. L. 359.

to the former code in New York,¹ though under the present code his title dates from the time of the service of the warrant or order, though there are decisions holding that his title relates back to the date when proceedings were begun resulting in his appointment.² Under the codes of procedure as a rule the receiver is authorized to sue in his own name in all actions where he is authorized to sue.³ As a general rule in this class of receiverships it may be stated that he takes the property and effects of the judgment debtor as he finds it subject to all rights therein and incumbrances thereon in favor of third parties, and his rights and powers are measured and determined by the rights and powers of the judgment debtor had no receiver been appointed, subject, however, to the exception that a receiver may avoid the frauds of the debtor which the latter could not do, but in doing so the receiver is the representative of the creditor and not the debtor.⁴

§ 155. Receiver's functions in supplementary proceedings.

The functions of a receiver in supplementary proceedings, except where regulated by statute, are not materially different from his functions in other proceedings of a general nature, and his duties are, in general, fixed by the order of appointment, the scope of the order, of course, being determined by the character of property over which the receivership extends. It is to be observed, however, that in this class of proceedings the receiver occupies the position of a trustee for the creditors in whose

¹ *Banks v. Potter*, 21 How. Pr. 469; *Becker v. Torrance*, 81 N. Y. 631; *Fillmore v. Horton*, 81 How. Pr. 424; *Lottimore v. Lord*, 4 E. D. Smith, 183.

² *Coleman v. Roff*, 45 N. J. L. 7; *Clark v. Gilbert*, 10 Daly, 316.

³ *Seymour v. Wilson*, 15 How. Pr. 355, reversing 16 Barb. 294; *Bostwick v. Menck*, 40 N. Y. 383; *Porter v. Williams*, 9 N. Y. 142.

⁴ A receiver, appointed in supplementary proceedings, takes only an equitable right of redemption in chattels mortgaged by the judgment debtor and reduced to possession by the mortgagee before proceedings be-

gun, and cannot maintain replevin for such chattels against the mortgagee. *Campbell v. Fish*, 8 Daly, 162.

A receiver appointed in aid of execution may maintain a bill of discovery and clear the debtor's property from fraudulent liens. *Bergen v. Littell*, 41 N. J. Eq. 18.

In an action by a receiver of a judgment debtor, appointed in supplementary proceedings to set aside a conveyance by the judgment debtor as being in fraud of creditors, the judgment debtor is a proper party. *Allison v. Weller*, 6 Thomp. & C. 291.

behalf he is appointed, and not that of agent or representative of the debtor. He succeeds to the rights of such creditors, and by reason of his trust relationship is entitled to enforce these rights to the extent necessary to satisfy the creditor's claims, the measure of his power being fixed by that of the creditors he represents. He becomes vested by his appointment with the legal title of the debtor to all property owned by him at that time, whether in the actual possession of the debtor, or in the possession of any one for his own use, and the receiver may reduce such property to his possession irrespective of the amount due the creditors he represents. As to property of the debtor which has been conveyed by him the vendee has a right to retain possession until the superior right of the creditors to divest him is shown, and in such case it sometimes happens that one or more of the creditors represented by the receiver has estopped himself from questioning the validity of the transfer, in which case the receiver's right of recovery is confined to those creditors not estopped.¹ The receiver may institute actions to set aside fraudulent transfers of the debtor in behalf of the creditors, and apply the proceeds derived therefrom.²

¹ *Bostwick v. Menck*, 40 N. Y. 388; *Mandeville v. Avery*, 124 N. Y. 376, reversing 57 Hun, 78; *Haynes v. Brooks*, 116 N. Y. 487; *Wright v. Nostrand*, 94 N. Y. 81; *Van Alstyne v. Cook*, 25 N. Y. 489; *Becker v. Torrance*, 31 N. Y. 681; *Porter v. Williams*, 9 N. Y. 142; *Metcalf v. Del Valle*, 64 Hun, 245, affirmed in 137 N. Y. 545; *Pettibone v. Drakeford*, 37 Hun, 628; *Salter v. Bove*, 33 Hun, 236 (as to amount recoverable); *Manley v. Rasiga*, 13 Hun, 288; *Mandeville v. Avery*, 20 N. Y. S. R. 801; *Lore v. Dierkes*, 16 Abb. N. C. 47; *Mann v. Pentz*, 2 Sandf. Ch. 257; *Re Stewart's Estate*, 8 N. Y. Civ. Proc. 354; *Olney v. Tanner*, 10 Fed. Rep. 101, affirmed in 18 Fed. Rep. 686.

² *Mandeville v. Avery*, 124 N. Y. 376; *Pittsburg Carbon Co. v. McMillan*, 119 N. Y. 46, 7 L. R. A. 46; *Wright v. Nostrand*, 94 N. Y. 81; *Porter v.*

Williams, 9 N. Y. 142; *Mandeville v. Avery*, 20 N. Y. S. R. 801; *Stewart v. Schwerter*, 5 Redf. 497; *Hill v. Western & A. R. Co.* 86 Ga. 284 (see stat.); *Prescott v. Pfeiffer*, 57 Mich. 21; *Walsh v. Byrnes*, 89 Minn. 527; *Chamberlain v. O'Brien*, 46 Minn. 80 (see stat.); *Merrill v. Rosser*, 87 Minn. 82 (see stat.); *Hamlin v. Wright*, 23 Wis. 491; cf. *Loos v. Wilkinson*, 110 N. Y. 195, 1 L. R. A. 250; *Murtha v. Curley*, 90 N. Y. 372; *Adsit v. Butler*, 87 N. Y. 585; *Davenport v. McChesney*, 86 N. Y. 242; *Underwood v. Sutcliffe*, 77 N. Y. 58; *Bostwick v. Menck*, 40 N. Y. 388; *Lawrence v. Bank of the Republic*, 35 N. Y. 320; *Campbell v. Erie R. Co.* 46 Barb. 540; *Storm v. Waddell*, 2 Sandf. Ch. 494. In *Higgins v. Gillesheiner*, 26 N. J. Eq. 308, the court held that the receiver has no such power in the absence of a statute.

§ 156. Right to sue and be sued.

As to the right of the receiver to sue, and be sued, and the various limitations and restrictions thereof, as well as the protection thrown around him in his possession, under this class of proceedings there is no distinction from the ordinary rules applicable to receiverships in general, and his liabilities and duties to the court, and those whose interests he represents, are the same in all cases, he being regarded as a trustee of an express trust, and the property in his possession being *in custodia legis*. The right of the receiver to sue has been fully treated heretofore, and it is only necessary to remark generally in this connection concerning the receiver's right to sue, in this class of actions, is unquestioned, where the debtor has fraudulently conveyed or assigned his property,¹ and so with regard to the fraudulent and illegal acts of an insolvent corporation,² but under the modern supplementary proceedings, the right is usually conferred by statute.

¹*Porter v. Williams*, 9 N. Y. 142, citing *Osborne v. Moss*, 7 Johns. 161; *Jackson v. Garnsey*, 16 Johns. 189; *Jackson v. Cadwell*, 1 Cow. 622; *Leach v. Kelsey*, 7 Barb. 466; *Jewett v. Palmer*, 7 John. Ch. 65; *Padgett v. Lawrence*, 10 Paige, 170; *DeMott v. Starkey*, 8 Barb. Ch. 408; *Underwood v. Sutcliffe*, 77 N. Y. 58. In this case it was held that the receiver's power did not extend to an action to enforce a statutory trust, as where lands were paid for by him but conveyed to another. See 1 Rev. Stat. 728, §§ 51, 52.

²*Gillet v. Moody*, 8 N. Y. 479; *Leavitt v. Palmer*, 8 N. Y. 19; *Brouwer v. Hill*, 1 Sandf. 629; *Hyde v. Lynde*, 4 N. Y. 393; *Chautauque County Bank v. White*, 6 N. Y. 236; *Bostwick v. Menck*, 40 N. Y. 383 (1 Hand).

Barclay v. Quicksilver Min. Co. 6 Lana. 25. This was an action brought in the state of New York by a sequestrator of the state of Pennsylvania, but the principles discussed are applicable to receivers; it was held that the foreign sequestrator might

sustain his action to set aside a fraudulent transfer of property made by a Pennsylvania corporation. On the question of comity the court say: "This state has not yet become a sanctuary for the protection of property in the hands of a transferee who has acquired it by a fraudulent contrivance." Cf. *Hamlin v. Wright*, 23 Wis. 491; *Dunham v. Byrnes*, 36 Minn. 106; *Barker v. Dayton*, 28 Wis. 387; *Wright v. Nostrand*, 94 N. Y. 81; *Carr v. Hilton*, 1 Curt. C. 230; *Kennedy v. Thorp*, 51 N. Y. 174. In *Olney v. Tanner*, 18 Fed. Rep. 636, it is held that the title to property fraudulently conveyed does not vest in the receiver, but merely the right to prosecute a suit to set aside the fraudulent conveyance; and where there has been an assignee in bankruptcy appointed the right of action is in the assignee and not the receiver. Citing *Glenny v. Langdon*, 98 U. S. 20, 25 L. ed. 48; *Trimble v. Woodhead*, 103 U. S. 647, 26 L. ed. 290; *Moyer v. Dewey*, 103 U. S. 301, 26 L. ed. 894. The rights of assignees in insolvency proceedings to

Pending a chancery suit having for its object the subjection of the debtor's real estate to the payment of liens thereon the appointment of a receiver may be dispensed with if the debtor will give security to account for the rents and profits in case there should be a deficiency arising on the sale of the premises, but if the debtor does not ask permission to give such bond the appointment will be regular.¹

§ 157. Order of appointment.

As we have already seen the order appointing a receiver cannot be questioned in a collateral proceeding,² and in a supplementary proceeding against an insolvent corporation the same doctrine prevails.³ Upon the opening up of a judgment against a railroad corporation in order to permit the corporation to come in and defend, the order appointing a receiver in a sequestration proceeding founded on the judgment should be vacated.⁴ A receiver in supplementary proceedings is fully protected by the order of appointment for all acts done thereunder, though the order of appointment is afterwards reversed.⁵ An order of appointment in this class of actions vests in the receiver the personal estate and equitable interests of the judgment debtor as of the date of the order, where the order is followed by giving bond as required,⁶ but he is not necessarily a trustee for all creditors, but is a trustee only for the benefit of the creditors at whose instance he is appointed, and in such case he must apply the money arising from a sale to the satisfaction of the judgments which

avoid fraudulent transfers which in many respects is similar to that of receivers is discussed in the following cases. *Kilbourne v. Fay*, 29 Ohio St. 264; *Southard v. Benner*, 72 N. Y. 424; *Simpson v. Warren*, 55 Me. 18; *Clough v. Thompson*, 7 Gratt. 26; *Staton v. Pittman*, 11 Gratt. 99; *Moncure v. Hanson*, 15 Pa. 385; *Tams v. Bullitt*, 35 Pa. 308.

¹*Grantham v. Lucas*, 15 W. Va. 425.

²Chap. II. § 22, ¶ (h)

³*Commercial Nat. Bank v. Burch*, 141 Ill. 519; *Harris v. Lester*, 80 Ill. 307; *Wing v. Dodge*, 80 Ill. 564; *Her-*

nandez v. Drake, 81 Ill. 84; *Wenner v. Thornton*, 98 Ill. 156. The validity of an order of appointment cannot be tried in a contempt proceeding. *Bagley v. Scudder*, 66 Mich. 97.

⁴*Rodburn v. Utica, I. & E. R. Co.* 28 Hun, 369.

⁵*Holcombe v. Johnson*, 27 Minn. 353.

⁶*Wilson v. Allen*, 6 Barb. 542; *Albany City Bank v. Schermerhorn*, 1 Clarke Ch. 297; *Porter v. Williams*, 9 N. Y. 142; *Rutter v. Tullis*, 5 Sandf. 611; *Cooney v. Cooney*, 65 Barb. 524; except such property as is exempt from levy and sale.

form the basis of the bill under which he is appointed.¹ The court, even in a creditor's proceeding, has a right to limit the order as to the amount of property over which the receivership is extended.²

§ 158. **Power of, in foreign jurisdiction.**

The power of the receiver to go into a foreign jurisdiction for the purpose of reaching the assets and property of a judgment debtor has elsewhere been considered. A question, somewhat analogous, as to the power of a receiver upon the return of an execution *nulla bona* to go into a court of equity, and through the instrumentality of a receiver reach choses in action due the judgment debtor from non-resident persons, has recently been considered in Massachusetts, where it is held that neither in that state nor in England has a court of equity power to compel a debtor to make a general assignment of his choses in action in in this class of proceedings; that in the absence of statutory power, the mere appointment of a receiver does not pass the title to such choses in action; and the right of a judgment creditor to file his bill in chancery, based on judgment and execution, and seek to reach choses in action due the judgment debtor from non-resident parties is doubtful, and that if such power exists it is based upon the doctrine of equitable attachment, in which case the debt and the person or persons sought to be reached, must be specifically described as definitely as at law.³

¹*Young v. Clapp*, 147 Ill. 176.

Though the defendant in a creditor's bill admits that he has certain property, but denies that he has any other, the order for the delivery of his property to the receiver must be general. *Browning v. Bettis*, 8 Paige, 568.

²*Jones v. La Touche*, 2 Sugden's Dec. 671; cf. *Wardell v. Leavenworth*, 3 Edw. Ch. 258; but the court in *Dilling v. Foster*, 21 S. C. 334, say: "It is difficult to understand how the court could in advance, and without an inquiry on the point, ascertain how much would be necessary; in fact the only certain means of ascertaining it would be by a sale."

³*Amy v. Manning*, 149 Mass. 487; *Harvey v. Varney*, 104 Mass. 436. Cf. *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *Brigham v. Luddington*, 12 Blatchf. 237; *Yeager v. Wallace*, 44 Pa. 294.

A receiver may be appointed, although all the property the debtor has is real estate in another state, and he may be required to convey the same to the receiver. *Towne v. Campbell*, 35 Minn. 231; *Smith v. Tozer*, 42 Hun, 22.

Where debtors are beyond the jurisdiction, their creditors numerous, their assets in the shape of money and credits, many of those indebted to them unknown, and where they have an

§ 159. Priorities under creditor's bills.

Where a creditor's bill is filed in behalf of the plaintiff therein, and not in behalf of other creditors of the debtor, the receiver is a trustee in behalf of the creditor in whose behalf he is appointed only,¹ and he does not become an agent of the debtor for the distribution of the property in the sense that an assignee in an insolvent proceeding does.² After the filing of a bill of this nature, other creditors may intervene and thereby become parties to the proceeding, but the proceeding by creditor's bill necessarily recognizes priorities among creditors and makes distribution of the assets according to such priorities.³

Where property in litigation under a creditor's bill is liable to depreciation and will be inevitably sacrificed if sold by a sheriff under an existing levy, a receiver will be appointed to take charge of such property and sell it under the direction of the court, and distribute the proceeds as the rights of parties may appear.⁴

The question has sometimes arisen as to the priority of rights obtained by a receiver under a creditor's bill and the purchaser at an execution sale. Thus, where a bill was filed to set aside a fraudulent transfer of the debtor on which a receiver was appointed, and an assignment made in general terms, pursuant to an order of court, of all the debtor's personal and real estate, the property not being described, the receiver's title is good as against a purchaser under a judgment docketed after the assignment.⁵ The law is otherwise where the judgment is prior to the assignment

agent within the jurisdiction, cognizant of all their resources and where conflicting claims among different creditors touching equitable priority, are to be settled, the remedy for creditors by bill, injunction, and the appointment of a receiver, is proper. *Bullin v. Ferst*, 55 Ga. 546.

Under New York Code of Civil Proc. §§ 2435, 2452, 2458, 2468, supplementary proceedings may be sustained against a foreign corporation having no agent and doing no business in that state, and a receiver may be appointed in such proceeding.

Logan v. McCall Pub. Co. 140 N. Y. 447.

¹*Russell v. Chicago Trust & Sav. Bank*, 139 Ill. 588, 17 L. R. A. 845; *Young v. Clapp*, 147 Ill. 176.

²*Bouton v. Dement*, 128 Ill. 142; *Young v. Clapp*, *supra*.

³*Young v. Clapp*, *supra*; *Russell v. Chicago Trust & Sav. Bank*, 139 Ill. 588, 17 L. R. A. 845.

⁴*Kuhl v. Martin*, 26 N. J. Eq. 60.

⁵*Chautauque County Bank v. White*, 6 N. Y. 236; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Porter v. Williams*, 9 N. Y. 142.

to the receiver.¹ It is premature, however, before the hearing to determine whether creditors or any of them are entitled to priority in payment, and order their payment.²

A mortgage prior in point of time to a judgment entitles the mortgagee to interest on his mortgage before the judgment creditor is entitled to payment. But the rule is different where one incumbrancer obtains the appointment of a receiver, and subsequently the receivership is extended in an independent proceeding by another incumbrancer. In such case the latter, though a prior incumbrancer, loses the rents received before the extension.³

§ 160. Courts reluctant to appoint where legal title involved.

Courts are reluctant in appointing a receiver on behalf of a judgment creditor over real estate where the legal title and possession are in third parties. It is not ordinarily the province of a court of equity to determine the legal title to real property as between contestants therefor, and it will not appoint a receiver in such cases except in cases of fraud clearly proved, accompanied by danger of loss, and the plaintiff must show a clear right to the property, or some lien upon it, or that it constitutes a special fund to which he has a right to resort for the satisfaction of his judgment.⁴ Courts are equally reluctant to disturb a mortgagee in possession who holds as security for the payment of his mortgage debt, and a receiver will not be appointed if the mortgagee is financially able to respond for the receipts.⁵ But a receiver may be appointed in such case if it is necessary to protect the interest of all parties, as where the mortgagee is guilty of fraud or is acting in collusion with the mortgagor and for his benefit.⁶

¹*Chautauque County Bank v. Risley*, 19 N. Y. 369; *White's Bank v. Farthing*, 101 N. Y. 344; *Shand v. Hanley*, 71 N. Y. 319.

²*Penn v. Whitehead*, 13 Gratt. 74.

³*Holland v. Cork & K. R. Co.* 2 Ir. Rep. Eq. 417.

⁴*Lloyd v. Passingham*, 16 Ves. Jr.

68; *Mays v. Rose*, Freem. Ch. (Miss.) 718; *Vanse v. Woods*, 46 Miss. 120.

⁵*Quin v. Brittain*, 3 Edw. Ch. 314; *Furlong v. Edwards*, 3 Md. 99; *Silverman v. Kuhn*, 53 Iowa, 436.

⁶*Gouthwaite v. Rippon*, 8 L. J. Ch. N. S. 139; *Rose v. Bevan*, 10 Md. 466.

CHAPTER X.

RECEIVERSHIP IN FORECLOSURE OF MORTGAGES.

§ 170. Generally.

§ 171. Usual grounds for invoking jurisdiction.

- (a) Where mortgage provides for receiver.
- (b) Where statute provides for receiver.
- (c) Where security is inadequate.
- (d) Where waste is being committed.
- (e) Where mortgagor is guilty of fraud.

§ 172. When appointed.

- (a) Where rents and profits are pledged.
- (b) Where security is inadequate.
- (c) Where trustee refuses to take possession.
- (d) Where there are equitable grounds for appointment.
- (e) Where statute provides for appointment.
- (f) Necessity for appointment to be clearly shown.
- (g) Where there is a contest as to property mortgaged.
- (h) Where the mortgagor or his grantee are guilty of fraud.
- (i) Where the mortgagor is committing waste.
- (j) Where default in interest and property indivisible.

§ 173. When not appointed.

- (a) Where legal title is in mortgagee and he has a legal remedy.
- (b) Where by the terms of the mortgage the right is not given.
- (c) Where by statute mortgagor entitled to possession until sale.

- (d) Where plaintiff's allegations are denied or amount due is disputed.

- (e) Where insolvency of mortgagor or his grantee not shown.

- (f) Where right of plaintiff to foreclosure not clearly shown.

- (g) Where plaintiff has no equitable standing in court.

- (h) Where pending appeal, appeal bond affords protection.

- (i) Where defendant secures plaintiff by deposit, etc.

- (j) Where receivership property is a statutory homestead.

- (k) Where plaintiff guilty of laches.

§ 174. Inadequacy of security as ground for.

- (a) Two elements.

- (1) Insufficiency of property to pay debts.

- (2) Insolvency of mortgagor or his grantee.

- (b) One element not sufficient.

- (c) Presumption as to adequacy.

- (d) Rule in N. J., Cal., S. C., Ia. and Mich.

- (e) Inadequacy has reference to plaintiff's indebtedness alone.

- (f) Rule relaxed when other equitable grounds shown.

- (g) English practice as to rents collected before and after time for redemption.

§ 175. Same subject continued.

§ 176. Over what appointed.

§ 177. When appointed.

- (a) Before decree.

- (b) After decree

§ 178. General rules applicable.

§ 179. Relative rights of senior and junior mortgagees.

- (a) English rule.
- (b) American rule.

§ 180. Application of parties other than mortgagees.

- (a) In behalf of wife.
- (b) In behalf of annuitants.
- (c) In behalf of bondholders.
- (d) In behalf of vendors.

§ 170. Generally.

Under proper circumstances courts exercising equitable jurisdiction frequently appoint receivers over mortgaged property on application of the mortgagee, usually in proceedings instituted for the purpose of foreclosure of the mortgage. The usual and ordinary grounds upon which the court or chancellor will grant this relief are considered in the following sections. It is proper to observe, however, that under the English practice, until changed by statute, the appointment of a receiver for mortgaged premises was exceedingly rare for the reason that the mortgagee had the legal title to the property and was entitled by reason thereof to the possession of the mortgaged premises which were recoverable in the common law action of ejectment, and, therefore, the equitable jurisdiction of the court could not be called into action. It was only where the mortgagee held the equitable title as in the case of a junior mortgagee, or where for some other reason the mortgagee had no adequate legal remedy, that the English court of chancery was called upon to appoint a receiver. Some of the courts in this country have been disposed to follow the English practice, but the courts of both countries have now come to recognize the appointment of receivers in foreclosure proceedings, on the application of the mortgagee, as one of the most common modes of equitable relief, under the rules and practice of chancery courts.

§ 171. Usual grounds for invoking jurisdiction.

The grounds upon which a receiver is usually appointed in mortgage foreclosure cases are:

- (a) Where by the terms of the mortgage a receiver is provided for upon default in the payment of the principal and interest, or other default in the covenants of the mortgage or trust deed.¹

¹ *Whitehead v. Wooten*, 48 Miss. 523;
Morrison v. Buckner, Hempst. 442.

(b) Where there is a statutory cause for the appointment of a receiver.¹

(c) Where the mortgage security has become inadequate by reason of a depreciation in the value of the property and the insolvency of the mortgagor or other person liable for the mortgage indebtedness.²

(d) Where the mortgagor is committing waste, or is otherwise injuring the value of the security, or permits the property to be sold for taxes, or permits the insurance to expire.³

(e) Where the mortgagor or his grantee is guilty of fraud or bad faith.⁴

§ 172. When appointed.

In foreclosure proceedings, as in other cases, the court is vested with discretion,⁵ and in the matter of appointment is governed

¹*Tripp v. Chard R. Co.* 21 Eng. L. & Eq. 53, 17 Jur. 887; *Hursh v. Hursh*, 99 Ind. 500; *Douglass v. Cline*, 13 Bush, 608; *Woolley v. Holt*, 14 Bush, 788; *Northwestern Mfg. L. Ins. Co. v. Park Hotel Co.* 37 Wis. 125.

²*United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 478; *Quincy v. Cheeseman*, 4 Sandf. Ch. 405; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Warner v. Gouverneur*, 1 Barb. 86; *Commercial & Sav. Bank v. Corbett*, 5 Sawy. 172; *Phillips v. Eiland*, 52 Miss. 721; *Myers v. Estell*, 48 Miss. 372; *Hill v. Robertson*, 24 Miss. 368; *Lehman v. Tallahassee Mfg. Co.* 64 Ala. 567; *Korchner v. Fairley*, 80 N. C. 24; *Henshaw v. Wells*, 9 Humph. 568; *Finch v. Houghton*, 19 Wis. 150; *Douglass v. Cline*, 13 Bush, 608; *Newport & C. Bridge Co. v. Douglass*, 13 Bush, 678; *Woolley v. Holt*, 14 Bush, 788; *Hyman v. Kelly*, 1 Nev. 179; *Price v. Doudy*, 34 Ark. 285; *Brown v. Chase*, Walk. Ch. 43.

³*Stockman v. Wallis*, 80 N. J. Eq. 449; *Chetwood v. Coffin*, 80 N. J. Eq. 450; *Schreiber v. Carey*, 48 Wis. 208;

Finch v. Houghton, 19 Wis. 149; *Wallah F. Ins. Co. v. Loud*, 20 How. Pr. 95; *Eslava v. Crampton*, 61 Ala. 507.

⁴*Cortleyou v. Hathaway*, 11 N. J. Eq. 48.

⁵"In the appointment of a receiver, especially in a foreclosure case, very much must be left to the discretion of the district judge, and unless it is made to appear that this discretion has been exercised unwisely and to the injury of the party complaining, this court will not interfere." *Jacobs v. Gibson*, 9 Neb. 380. "Assuming that the court has power to compel the owner to pay the rents to the receiver after his appointment, the exercise of the power is in the discretion of the court and so not reviewable here." *Rider v. Bagley*, 84 N. Y. 461. By the appointment of the receiver the plaintiff obtained an equitable lien on the unpaid rents and upon them only. *Lofsky v. Monjer*, 3 Sandf. Ch. 69; *Howell v. Ripley*, 10 Paige, 48; *Astor v. Turner*, 11 Paige, 436; *Mitchell v. Bartlett*, 51 N. Y. 447; *Argall v. Pitts*, 78 N. Y. 242. The power is discre-

largely by the circumstances of each particular case,¹ yet it is possible from the general uniformity of decisions to lay down the

tionary and often of great utility. *Skip v. Harwood*, 8 Atk. 564. It is discretionary as to the person appointed ordinarily. *Benneson v. Bill*, 62 Ill. 408. The appointment generally is in the sound discretion of the court and not to be exercised except in strong cases, and in no case should the power be exercised if it is clear that on a foreclosure the property will bring enough to pay the debt, interest and costs. *Pullan v. Cincinnati, & C. A. L. R. Co.* 4 Biss. 35. See further § 5; ¶ 1, *ante*.

Under the English Judicature Act of 1873 it is provided that a receiver may be appointed by an interlocutory order in all cases in which it shall appear to the court to be just or convenient that such order shall be made.

See also *Milwaukee & M. R. Co. v. Soutter*, 69 U. S. 2 Wall. 510, 17 L. ed. 900.

State v. Wilmer, 65 Md. 178; *Anon*, 12 Ves. Jr. 4; *Middleton v. Dodswell*, 18 Ves. Jr. 266; *Long v. Majestre*, 1 Johns. Ch. 305.

It is not an abuse of discretion to refuse to appoint a receiver of the rents and profits of premises, the legal title of which has been transferred to the person applying therefor as mortgagee, where the amount due him is in dispute. *Valentine v. Juch*, 46 N. Y. S. R. 64.

In *Tylen v. Wabash R. Co.* 8 Biss. 247, it is declared that while the court exercises a broad discretion in the matter of appointment, yet it will not make such appointment if it perceives that a much greater injury will result to those interested in the railroad than by leaving the property in the hands of those then holding it.

In *Myers v. Estell*, 48 Miss. 372, it

is said that the appointment of a receiver on the application of the mortgagee being a matter resting in the sound discretion of the court the better rule to govern that discretion is that which will grant the order of the appointment as it may or may not be an essential means to pay the debt secured by the mortgage. The exercise of this power depends upon sound discretion and is governed to a great extent by the circumstances of each particular case. *Morrison v. Buckner*, Hempst. 442; *Ver Plank v. Caines*, 1 John. Ch. 58; *Cone v. Paulte*, 12 Heisk. 506.

In *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. Rep. 182, it is held that the appointment of a receiver in a railroad foreclosure is not a matter of right, but rests in the sound discretion of the court and is a power to be exercised sparingly and with great caution. See also *Milwaukee & M. R. Co. v. Howard*, 181 U. S. Appx. 81, 18 L. ed. 252; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694; *Owen v. Hoeman*, 4 H. L. Cas. 997.

In *Williamson v. New Albany, etc. R. Co.* 1 Biss. 198, it is said that where a court of equity is asked to interfere with the management of a corporation it will look into the facts and exercise an equitable discretion and will not enforce the strict penalty of the deed.

¹In *McHenry v. New York, P. & O. R. Co.* 25 Fed. Rep. 114, upon a hearing of both sides, and it not appearing that the property of the company was in jeopardy, or in need of the protecting control of the court, and the continuance of the receivership being likely to prove prejudicial

following general principles under which the court will appoint a receiver over the mortgaged property, or of the rents and profits thereof; as,

to innocent holders of the securities, the order appointing the receiver was rescinded.

In *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 27 Fed. Rep. 146, the trustee brought suit for the benefit of the bondholders to foreclose a trust deed for overdue interest, and it was held that upon payment of the amount due, the foreclosure decree would be suspended until default again occurred in the payment of interest, the appointment of a receiver resting in the sound discretion of the court. In this case it was held, also, that mere insolvency may or may not call for the appointment of a receiver and the motion of the appointment was deferred.

In *Tylen v. Wabash R. Co.* 8 Biss. 247, it was held that the mere fact that there had been a default in the payment of the debt is no ground for the appointment of a receiver in the absence of a provision in the mortgage that the mortgagee shall have the rents, and the court will not, in deference to the mere technical rights of a very small minority of the bondholders, appoint a receiver without consulting the interests of others whose rights are entitled to equal protection. Cf. *Voss v. Reed*, 1 Woods, 650.

In *Syracuse City Bank v. Tallman*, 31 Barb. 201, it is held that where a mortgagor is insolvent and fails to pay at the time appointed and the mortgaged premises are inadequate security as between the mortgagee and the mortgagor it is within the equitable discretion of the court to allow the latter to intercept the rents and profits for his better protection from

loss, and that this is the utmost extent to which relief has been granted within any admitted principles of equity.

In *First Nat. Bank v. Gage*, 79 Ill. 207, it is held that a receiver should not be appointed in any case unless it is made to appear that there has been a particular necessity for the step, to preserve some particular property for such persons as shall be entitled thereto, and from all the circumstances in the case the appointment was refused.

In *Silverman v. Northwestern Mut. L. Ins. Co.* 5 Ill. App. 124, it is held that in case of foreclosure a receiver should not be appointed unless it is made to appear that there is a comparative necessity for such action by reason of the insolvency of the mortgagor, or in order to protect some particular property for such parties as are entitled to the benefit thereof, and where the owner of the equity of redemption is solvent, although the mortgagor is insolvent, there is no such reasonable case as will warrant the appointment of a receiver.

In *Eslava v. Orampton*, 61 Ala. 507, it is said that where the mortgagor had agreed in the mortgage to insure the property, pay taxes, and keep it in repair and had failed to do so and was shown to be insolvent the court would not closely scrutinize conflicting evidence as to the value of the mortgaged premises upon which a receiver was appointed.

In *Cortleyou v. Hathaway*, 11 N. J. Eq. 39, it is held that inadequacy in the value of the mortgaged premises and insolvency of the mortgagor do not constitute sufficient grounds for

(a) Where there is an express grant or pledge of the rents and profits to secure the mortgage indebtedness.¹

the appointment of a receiver, but under the peculiar circumstances of the case a receiver was appointed. Among these were that the mortgagor had sold the property and he, and his grantee, were insolvent, inadequacy of the security for the mortgage money; violation of an agreement on the part of the mortgagor to reduce the amount of the mortgage, etc.

In *Keep v. Michigan, L. S. R. Co.* 6 Chicago L. N. 101, the court say: "Receivers are not appointed as a matter of course, but it rests in the sound discretion of the court. Whether the power will be exercised depends always upon the facts and rights as they appear before the court. There are a multitude of cases showing where the power has and where it has not been exercised, each case depending upon its own particular facts and circumstances.

Assuming that the court has power in a foreclosure suit to appoint a receiver of the rents the exercise of such power is in the discretion of the court, and not reviewable. *Rider v. Bagley*, 84 N. Y. 461.

The power to appoint a receiver *pendente lite* in a foreclosure proceeding is a part of the incidental jurisdiction of the court and does not depend on a statute. *United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 478; *Hollenbeck v. Donnell*, 94 N. Y. 842.

¹ In *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. ed. 144, the mortgage covered the property, rents, issues and profits, with the provision that if there was a default in paying the interest the mortgagee might take possession of the property, manage the same and receive and collect all

rents and claims due and to become due. After default the mortgagee filed his bill setting forth that the company had on hand moneys and claims due it and asked to have the same applied to the mortgage. Subsequently a judgment creditor, on the return of an execution unsatisfied, filed a bill to subject such moneys and claims to the payment of his judgment, and it was held that inasmuch as the mortgagee had not taken possession his claim to the rents and income on hand at the time of filing his bill must be postponed to that of the judgment creditor. See also *Galveston, H. & H. R. Co. v. Cordry*, 78 U. S. 11 Wall. 459, 20 L. ed. 199, and *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603, 23 L. ed. 405.

In *Des Moines Gas Co. v. West*, 44 Iowa, 28, the mortgage pledged the income, rents and profits to the payment of the debts, and it was held that the creditor need not conclusively establish his right to recover before he is entitled to ask for the appointment of a receiver; it is sufficient if he show a probable right, and in such case if the debtor is insolvent the appointment follows as a matter of course.

The court say: "There is a clear and well-defined distinction as to the right to have a receiver appointed where the bond and mortgage, as in this case, pledge the rents or income to the payment of the debt and where they do not."

In *Wagar v. Stone*, 86 Mich. 364, it is held that the mortgagor being entitled under the statute of Michigan to the possession and consequently to the rents and profits of the mortgaged premises until such a time as

(b) Where the mortgaged property is an inadequate security for

his title is divested by a perfected foreclosure, it is not competent to cut short his right in this regard by means of a receiver appointed in a foreclosure suit. It should be noticed that in Michigan the mortgage conveys no title to the mortgagee, but a security merely for the debt, and before the foreclosure the mortgagee has no legal interest in the mortgaged premises. See also *Lee v. Olary*, 88 Mich. 223; *Hazeltine v. Granger*, 44 Mich. 508; *Reading v. Waterman*, 46 Mich. 107. This provision is for the benefit of the mortgagor, however, and he may waive it. *Beecher v. Marquette & P. Rolling Mill Co.* 40 Mich. 807.

In *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 280, it is held that when not varied by the contract, the law of the state where the mortgage is executed and the mortgaged property is situated furnishes the rule for determining the rights of the mortgagees after condition broken; that in Arkansas a common law rule prevails and the failure of a mortgagor to pay the mortgage debt at the law day the mortgagee is entitled to the possession of the mortgaged property and may maintain ejectment therefor. But in case of a railway mortgage embracing rolling stock and other personal property the proper remedy of the mortgagee is by a bill in equity for a specific performance of the mortgagee's rights. See also *Morrison v. Buckner*, Hempst. 442.

In *Union Trust Co. v. St. Louis, I. M. & S. R. Co.* 4 Dill. 114, the court refused to appoint a receiver of a railroad on the showing merely that there had been a default in the payment of interest secured by a mortgage of the property and incomes of

the company. It was held that it was necessary in addition to this to show that ultimate loss would happen to the beneficiaries of the mortgage by permitting the property to remain in the hands of the owners until final decree and sale. The facts in the case were considered as not sufficient to warrant the appointment of a receiver, under the authority of *Williamson v. New Albany, etc.*, R. Co. 1 Bliss. 198.

In *Allen v. Dallas & W. R. Co.* 8 Woods, 316, where the mortgage covered the income and profits as well as the property of the railroad company to secure principal and interest, and authorized the trustee in default in the payment of interest to take possession of the mortgaged premises and apply the income to the payment of the interest, it was held upon the application of the trustee that such default was sufficient ground for the appointment of a receiver. In such a case the appointment of a receiver would not be denied because it was not shown that the property mortgaged was insufficient to pay the mortgaged debt, or that it is in jeopardy, or the company insolvent, or the amount due was in dispute. Where the receipts and income of a railroad are pledged for the payment of principal and interest, it is said that this provision of the mortgage or trust deed gives credit to the bondholders, which enhances their value, and induces capitalists to purchase them. See also *Whitehead v. Wooten*, 48 Miss. 528; *Morrison v. Buckner*, Hempst. 442.

As to the right of the mortgagor to the rents and profits generally, see *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 500, 32 L. ed. 186; *Gilman*

the payment of the mortgage indebtedness, and there is danger of loss unless a receiver should be appointed.¹

v. Illinois & M. Teleg. Co. 91 U. S. 603, 28 L. ed. 405; *United States Trust Co. v. Wabash W. R. Co.* 150 U. S. 807, 37 L. ed. 1091; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 86 Fed. Rep. 226; *Smith Charities Trustees v. Connolly*, 157 Mass. 276; *Re Life Association of America*, 96 Mo. 686; *Childs v. Hurd*, 32 W. Va. 87. As to when the mortgagor must account to the mortgagee for the earnings, see *Sage v. Minneapolis & L. R. R. Co.* 125 U. S. 878, 31 L. ed. 699; *American Bridge Co. v. Heidelberg*, 94 U. S. 800, 24 L. ed. 144. Under a railroad mortgage as to who is entitled to the income, see *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603, 28 L. ed. 405; *American Bridge Co. v. Heidelberg*, *supra*; *Fosdick v. Schall*, 99 U. S. 253, 25 L. ed. 339; *Teal v. Walker*, 111 U. S. 250, 28 L. ed. 418; *Brown v. Maryland*, 114 U. S. 605, 29 L. ed. 235; *Young v. Northern Illinois Coal & I. Co.* 9 Biss. 305; *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 771; *Farmers' Loan & T. Co. v. Missouri, I. & N. R. Co.* 21 Fed. Rep. 271; *White v. Pulley*, 27 Fed. Rep. 441; *Hay v. Alexandria & W. R. Co.* 4 Hughes, 873.

¹ In *Kelly v. Alabama & O. R. Co. Trustees*, 58 Ala. 489, it appeared that the corporation had been declared bankrupt, interest had accumulated on its bonds exceeding the value of the property mortgaged, and purchasers of the equity of redemption at the assignee's sale were in possession of the road and property mortgaged, receiving the income, profits and earnings of the road which the mortgagee was entitled to take, and using the same for their own exclusive benefit, a clear case was presented, it was held, for the appointment of a

receiver. See also *Lehman v. Tallahassee Mfg. Co.* 64 Ala. 567.

In *Cheever v. Rutland & B. R. Co.* 39 Vt. 653, it is held that when the mortgagor or assignees are in possession, denying the right of the mortgagee to a foreclosure, the utmost the court can do is the appointment of a receiver for the purpose only of preserving the property and its rents and profits from waste and diversion.

In *Hamilton v. Austin*, 36 Hun, 188, it is held that after foreclosure is begun the plaintiff may, if the security is in jeopardy, intercept through the aid of a receiver, the rents or emblements or both, upon the theory that the whole estate is pledged as security for the debt, and that the creditor is immediately entitled to his money or the property pledged [*Hollenbeck v. Donnell*, 94 N. Y. 847; *Ogdensburg Bank v. Arnold*, 5 Paige, 40]; but in such case the receiver is not entitled to recover for rents collected or emblements removed prior to the date of his appointment, his right being confined to subsequent rents and profits, and the rents uncollected at the time of his appointment.

In regard to waste of mortgaged premises the court say: "Waste is an improper destruction, or material alteration or deterioration of the freehold, or of things forming an essential part of it done or suffered by a person rightfully in possession as tenant, or having but a partial estate like the mortgagor. It is not waste for a mortgagor of the land to sell timber, remove or change fixtures, if done in good faith and in the usual course of good husbandry and before foreclosure is begun or default has occurred upon the mortgage. Nor is

it waste for him to sell stone from open quarries or minerals from open mines if done in the usual course of business, though the product removed may exceed the value of the remaining freehold."

In *Hollenbeck v. Donnell*, 94 N. Y. 343, it is held that the power to appoint a receiver of rents and profits of mortgaged premises accruing pending a foreclosure was inherent in the court of chancery prior to the adoption of the code, and was continued by the code and not abrogated by the section defining cases in which receivers may be appointed; and where it appeared that about one sixth of the mortgage debt was due and the premises were divided into equal parcels capable of being sold separately without injury to the parties interested, assuming the appointment of the receiver to have been proper in the absence of a specific pledge of the rents and profits, plaintiff is not entitled to a receiver for that portion of the debt not yet due or of that portion of the premises as to which his rights to sell have not yet accrued.

In *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 261, it is held that a mortgagee after condition broken at common law is entitled to the possession of the mortgaged premises and may maintain ejectment therefor. This law is embodied in the mortgage in effect, and where a mortgage embraces real, personal and mixed property, the appropriate remedy is in equity. See also *Shepley v. Atlantic & St. L. R. Co.* 55 Me. 395; *First Nat. L. Ins. Co. v. Salisbury*, 180 Mass. 808; *Warner v. Rising Fawn Iron Co.* 3 Woods, 514; *North Carolina R. Co. v. Drew*, 3 Woods, 713; *State v. Northern C. R. Co.* 18 Md. 193.

See *Heinsheimer v. Dayton R. Co.* 3 Ry. & Corp. L. J. 268.

In *Keop v. Michigan, L. S. R. Co.* 6

Chicago L. N. 101, it is held that to justify the appointment of a receiver in a case of foreclosure, one ingredient is that the security is inadequate, and another ingredient is that the mortgagor or party personally liable for the debt must be shown to be irresponsible for any deficiency in the sale of the mortgaged premises.

In *Tyson v. Wabash R. Co.* 8 Biss. 247, it is said the mere fact that there has been a default in the payment of the debt is not ground for the appointment of a receiver, unless there be a stipulation in the mortgage that the mortgagee shall have the rents. Mr. Justice Harlan says (page 254): "Upon examination of these, and other authorities cited, it will be found that the action of the courts has depended largely upon the peculiar circumstances of each case. In no instance has the action of the court in appointing or refusing to appoint a receiver rested exclusively upon the technical legal right of the parties." Mr. Justice Bradley, in *Voss v. Reed*, 1 Woods, 650, uses the following language: "But all the circumstances in the case are to be taken into consideration, and if the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or convenience render the appointment of a receiver improper or inexpedient, none will be appointed."

In *Union Trust Co. v. St. Louis, I. M. & S. R. Co.* 4 Dill. 114, the court refused to appoint a receiver merely upon a showing that there had been a default in the payment of interest.

In *Brassey v. New York & N. E. R. Co.* 9 Fed. Rep. 668, it is said that an insolvent railroad corporation may be put in the hands of a receiver when the welfare of all interests clearly requires it, even though no default has

actually been made by the corporation in its obligations to the plaintiff but where the default is imminent and manifest and where the corporation is in peril of breaking up.

In *Burlingame v. Parce*, 12 Hun, 144, the court say: "To entitle a mortgagee to have a receiver appointed, it must appear that the mortgaged premises are inadequate security for the debt and that the mortgagor or other person personally liable for the debt is insolvent," on the authority of *Syracuse City Bank v. Tallman*, 81 Barb. 201; *Re Prime*, 1 Barb. 306; *Ogdensburg Bank v. Arnold*, 5 Paige, 38; *Shotwell v. Smith*, 3 Edw. Ch. 588. See also *Sea Ins. Co. v. Stebbens*, 8 Paige, 565; *Astor v. Turner*, 11 Paige, 436; *Frelinghuysen v. Colden*, 4 Paige, 204.

In *Shotwell v. Smith*, *supra*, the vice chancellor says: "Indeed, I consider that the court has no authority to interfere with a mortgagor's right to the rents unless such rents as well as the property have been pledged as security for the debt, or there is a clear want of security."

In *Grant v. Phœnix Mut. L. Ins. Co.* 121 U. S. 105, 80 L. ed. 905, it is held that where the trust deed does not convey the rents and profits of the property, the court may appoint a receiver where the debtor is insolvent and the mortgaged property insufficient security and there is good cause to believe that it would be wasted or deteriorated.

In *Callanan v. Shaw*, 19 Iowa, 183, it is held that it must clearly appear that the whole mortgaged premises are insufficient in value to pay the debt or that the court should take control of the estate to protect the rights of a party who has a clear, strong claim against it. The court say: "In this state the mortgagor being in possession, this possession

under the legal estate should not be disturbed by the appointment of a receiver unless indeed in cases of fraud clearly proved or danger to the mortgagee (having a strong claim), if the intermediate estate or possession should not be brought under the court. In any case the receiver is appointed against the holder of the legal title with reluctance." This case is based on *Lloyd v. Passingham*, 16 Ves. Jr. 59; *Smith v. Smith*, 2 Younge & C. 351; *Knight v. Duplessis*, 2 Ves. Sr. 360; *Tolderow v. Coll*, 1 Younge & C. 621.

In *Morrison v. Buckner*, Hempst. 442, the court say, adopting the language of Coote on Mortgages in part (Law Lib. 256): "If the mortgagee having the legal estate neglect to take the precaution of an agreement with the mortgagor for the appointment of a receiver he cannot obtain such appointment by order of the court, but must proceed to eject the mortgagor. Now, without adopting this rule to its fullest extent, it is proper to observe, generally, that receivers in mortgage cases will never be appointed unless it is clearly shown that the security is inadequate or that the rents and profits have been expressly pledged for the debt; or that there is imminent danger of waste, removal, or destruction of the property. There must be some very strong special reason for it."

In *Heavilon v. Farmers' Bank*, 81 Ind. 249, it is said that a petition for the appointment of a receiver must show affirmatively the facts which make the receiver necessary and it will not be sufficient to allege ignorance of material facts, nor allege a legal conclusion without stating the facts upon which it is predicated.

In *Schreiber v. Carey*, 48 Wis. 208, where by the law of Wisconsin the mortgagor retains the legal title until

foreclosure sale a receiver may be appointed in a proper case when it is necessary to protect the mortgagee's interest. And when the property was more than sufficient in value to pay the amount due under the mortgage, yet if it appear that the property could not be sold in parcels, and that the whole mortgage debt would become due before there could be a sale made under the judgment, so far as the appointment of a receiver is concerned the whole debt would be treated as due.

In *Finch v. Houghton*, 19 Wis. 149, it appeared that the mortgage debt was due and considerable amount of interest unpaid, and the owner of the equity of redemption who was in possession neglected to pay the taxes, and the evidence tended to show that he had endeavored to obtain a tax deed upon the property to defeat the mortgage, and also that the mortgaged premises were inadequate security and the parties personally liable were unable to pay the deficiency that might arise upon the sale, it was held that a receiver was proper.

In *Boston & P. R. Corp. v. New York & N. E. R. Co.* 12 R. I. 220, where the mortgagee was in possession and a suit to redeem was brought by the mortgagor a receiver was refused as against the mortgagee so long as there was a balance due under the mortgage unless it was shown that the mortgagee was mismanaging the property.

See further inadequate security, § 174, *post*.

In *Stockman v. Wallis*, 80 N. J. Eq. 449, it appeared that the owner of part of the mortgaged premises received the rents therefrom and refused to apply them on account of the interest due on the mortgage and neglected to pay the taxes, and there being no personal security and the

premises being insufficient a receiver was appointed.

In *Wall Street F. Ins. Co. v. Loud*, 20 How. Pr. 95, it appeared that the mortgagor had conveyed the premises subject to the mortgage and it was held that he was not in a position to object to a receiver, having no interest in the rents and profits nor the possession, and where it is shown that his grantee neglected to pay taxes, that a sale therefore had been made, that the insurance of the buildings had been neglected and the mortgagor being insolvent a case is presented for the appointment of a receiver.

In *Bolles v. Duff*, 38 How. Pr. 492, it is held that where anything is due, the mortgagee in possession will not be deprived of such possession by the appointment of a receiver and particularly so where he is responsible and able to account for and pay any excess of rents collected after the payment of his debt, or will give security to do so. If, however, it appears that the mortgagee is irresponsible, or that the rents and profits would be lost or be in danger of loss, or was committing waste or materially injuring the premises a different rule would prevail.

In *Milwaukee & M. R. Co. v. Souter*, 69 U. S. 2 Wall. 510, 17 L. ed. 900, it is held that while the appointment of a receiver ordinarily rests wholly within the discretion of the appointing court yet such rule is not always absolutely true, and under the facts and circumstances of the case it was held the refusal to appoint was a judicial error.

Failure of the mortgagee to pay taxes, insurance or interest, and inadequacy of security and diversion of the income are adequate grounds for a receiver in a foreclosure proceeding. *Shepherd v. Pepper*, 138 U. S. 626, 33 L. ed. 706.

(c) Where the trustee in express terms has power upon default, to take possession of the mortgaged premises, and he refuses so to do.¹

(d) Where the legal title to the property mortgaged remains in the mortgagor, and the mortgagee has only an equitable title, and there are equitable grounds for relief, such as inadequacy of security, waste and nonpayment of taxes.²

¹Although a trustee may have a right to take possession under the trust deed, yet he may waive this right and file a bill to foreclose. *Williamson v. New Albany, etc. R. Co.* 1 Biss. 198. See also *Scott v. Clinton & S. R. Co.* 6 Biss. 529. A demand on the trustees was made after default that they should take possession of the trust property, and a refusal on their part authorizes a bill by the stockholders requiring them to take possession, and a failure to do so justifies the appointment of a receiver. *Wilmer v. Atlanta, R. A. L. R. Co.* 2 Woods, 409; *Warner v. Rising Fawn Iron Co.* 3 Woods, 514.

In *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1, it was held that the disclaimer of a trust by one trustee vests the estate in the remaining trustees, without any express provision in the deed therefor. See also *O'Reilly v. Alderson*, 8 Hare, 101; *Eaton v. Smith*, 2 Beav. 236; *Re Moravian Soc.* 26 Beav. 101. In Minnesota the holder of a mortgage does not have such title as authorizes a suit at law for possession and in such case a foreclosure is the appropriate remedy, but where the mortgage or trust deed gives the trustees the right to take possession on default and they fail to do so a receiver cannot be appointed in the foreclosure proceeding. An action of ejectment under the terms of the mortgage or trust deed could have been sustained. *Rice v. St. Paul & P. R. Co.* 24 Minn. 464.

²*Hollenbeck v. Donnell*, 29 Hun, 84,

94 N. Y. 342; *Kirchner v. Fairley*, 80 N. C. 84; *Durant v. Crowell*, 97 N. C. 367; *Grant v. Phenix Mut. L. Ins. Co.* 121 U. S. 105, 30 L. ed. 905; *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 27 L. ed. 610; *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 500, 32 L. ed. 166; *Cone v. Combs*, 18 Fed. Rep. 576.

And see, as to the legal title remaining in the mortgagor and the mortgagee being entitled to an equitable interest, *Packer v. Rochester & S. R. Co.* 17 N. Y. 295; *Kortright v. Cady*, 21 N. Y. 366; *Hubbell v. Moulson*, 53 N. Y. 228; *Syracuse City Bank v. Tallman*, 31 Barb. 201; *Sherman v. Willett*, 42 N. Y. 146; *Trimm v. Marsh*, 54 N. Y. 599.

Mr. Jones in his work on Mortgages (vol. 2, § 1521, 4th ed.) lays down the rule upon this subject briefly and concisely, in the following language: "The prevailing rule in those states in which the legal title is regarded as being in the mortgagor until foreclosure is that a receiver will be appointed upon the application of a mortgagee after default, without reference to his legal rights, whenever sufficient equitable grounds for this relief are shown, which are in general that the premises are an inadequate security for the debt and the mortgagor, or other person in possession, who is personally liable for the debt is unable to make good the deficiency." In support of the proposition the following cases are cited: *Scott v. Ware*, 65 Ala. 174; *Lehman v. Tallahassee Mfg. Co.* 64

(e) Where by statute the mortgagee is entitled to the appointment of a receiver.¹

(f) The necessity for the appointment, the special grounds upon which the relief is asked, must be clearly alleged and shown.²

(g) Where there is a contest as to the property covered by the mortgage.³

Ala. 567; *Price v. Dowdy*, 84 Ark. 285; *Haas v. Chicago Bldg. Soc.* 89 Ill. 498; *White v. Griggs*, 54 Iowa, 650; *Barnett v. Nelson*, 54 Iowa, 41; *Myton v. Dav-enport*, 51 Iowa, 588; *Sleeper v. Iselin*, 59 Iowa, 379; *Brown v. Chase*, Walk. Ch. (Mich.) 43; *Myers v. Estell*, 48 Miss. 372; *Whitehead v. Wooten*, 48 Miss. 523; *Phillips v. Eiland*, 52 Miss. 721; *Woolley v. Holt*, 14 Bush, 788; *Warwick v. Hammell*, 32 N. J. Eq. 427; *Bank of Ogdensburg v. Arnold*, 5 Paige, 39; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Jenkins v. Hinman*, 5 Paige, 309; *Warner v. Gouverneur*, 1 Barb. 36; *Syracuse City Bank v. Tall-man*, 81 Barb. 201; *Patten v. Access-ory Transit Co.* 4 Abb. Pr. 235; *Bolles v. Duff*, 35 How. Pr. 492; *Smith v. Tiffany*, 13 Hun, 671.

¹ See Jones on Mortgages, vol. 2, §§ 1521, 1522, and statutes and cases there cited.

Under the Judicature Act 1873 (§ 25, sub sec. 8), a mortgagee in possession is entitled to the appointment of a receiver, notwithstanding he has been paid all his interest and costs out of rents received while in possession, and that he has surplus rents in his hands. *Mason v. Westoby*, L. R. 32 Ch. Div. 206. But see *Re Pry-therch*, L. R. 42 Ch. Div. 590, where it is held that if a mortgagee has once taken possession he cannot relinquish at pleasure; that having assumed the responsibilities attaching to possession he cannot at his own pleasure get rid of them and as a general rule the court

will not by appointing a receiver assist him to do so.

² *Heavilon v. Farmers' Bank*, 81 Ind. 249; *First Nat. Bank v. Gage*, 79 Ill. 207, where it is said: "The bill contains no clear and distinct charge that defendants have any particular property or things in action in their possession, and there can be no necessity for a restraining order of court and still less reason can there be for the appointment of a receiver."

In *Callanan v. Shaw*, 19 Iowa, 188, it is held that a receiver will not be appointed where it does not clearly appear that the whole mortgaged premises are insufficient in value to pay the debt, or that the court should take control of the estate to protect the rights of a party who has a clear, strong claim against it.

In *Morrison v. Buckner*, Hempst. 442, the court say: "It is proper to observe generally that a receiver in mortgage cases will never be appointed unless it is clearly shown that the security is inadequate, or that the rents and profits have been expressly pledged for the debt (*Shotwell v. Smith*, 3 Edw. Ch. 588), or that there is imminent danger of waste, removal or destruction of the property. There must be some strong special reason for it. *Hackett v. Snow*, 10 Ir. Eq. Rep. 220.

³ *Wall Street F. Ins. Co. v. Loud*, 20 How. Pr. 95; *Eslava v. Crampton*, 61 Ala. 507. The right of the court of equity to try disputed titles to property is doubtful in any case and it

(h) Where the mortgagee or his grantee is in possession and is guilty of fraud or bad faith.¹

(i) Where the mortgagor is committing waste.²

(j) Where the principal is not due but an installment is of interest, and the premises are not divisible;³ not so however if the premiums are divisible.⁴

§ 173. When not appointed.

In foreclosure proceedings the general principles upon which the court bases its action in refusing to appoint a receiver may be stated in general terms as follows:

(a) Where the legal title is in the mortgagee, as in New Jersey, and he has an adequate legal remedy.⁵

will not do so except where the common law remedies are clearly inadequate. *Merchants' & M. Nat. Bank v. Kent*, 43 Mich. 292.

¹ *Cortleyou v. Hathaway*, 11 N. J. Eq. 39. In this case it is held that the rule in New York that inadequacy of security and insolvency of the mortgagor are sufficient to obtain the appointment of a receiver, has never been adopted in New Jersey, but if the inadequacy grows out of the fact of the buildings being burned, or being permitted to decay, or in case of waste, and the depreciation grows out of the fault or negligence of the mortgagor, or tenant in possession, or fraud on the part of the mortgagor, or bad faith in misappropriating the rents and profits to other purposes than that of keeping down the interest, then the court may properly appoint a receiver, though with caution. And see as to waste, *Brasted v. Sutton*, 30 N. J. Eq. 462.

² *Brasted v. Sutton*, *supra*.

³ *Quincy v. Cheeseman*, 4 Sandf. Ch. 483.

⁴ *Quincy v. Cheeseman*, *supra*; *Bank of Ogdensburg v. Arnold*, 5 Paige, 38; *Morris v. Branchaud*, 52 Wis. 187; *Hollenbeck v. Donnell*, 94 N. Y. 842,

reversing 29 Hun, 94. A receiver may be appointed before the maturity of the debt if default is imminent and unavoidable, and it is necessary to prevent a destruction of the business. *Thompson v. Natchez, W. & S. Co.* 68 Miss. 423. Cf. *Burrows v. Malloy*, 2 Jones & L. 521, 8 Ir. Eq. Rep. 482; *Chinnery v. Evans*, 11 H. L. Cas. 115.

⁵ In *McLean v. Presley*, 56 Ala. 211, it is held that a receiver of the rents and profits of mortgaged premises will sometimes be appointed at the instance of the mortgagee in aid of an action at law to recover the possession when the mortgagor is insolvent, but when the mortgagee having bought at his own sale under the power in the mortgage files a bill to have the uncertainty of his title resolved by a confirmation of the sale or a resale, he cannot have a receiver of the rents and profits because the mortgagor is committing waste and is insolvent.

In *Johnson v. Tucker*, 2 Tenn. Ch. 398, a judgment creditor who filed his bill to reach the equitable interest of his debtor in realty previously mortgaged was held to be entitled to a receiver where the rents are required for the payment of his debt, subject however, to the rights of the prior

mortgagee to take possession; but the receiver will be dispensed with upon the owner of the property giving bond with security to account for the rents; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Overton v. Bigelow*, 10 Yerg. 54; *Williams v. Noland*, 2 Tenn. Ch. 151. In this case it was held that failure of the party in possession of land in litigation to pay the taxes is sufficient ground for the appointment of a receiver. It was also held that the appointment of a receiver for an equitable creditor must always be without prejudice to persons having prior legal estates or prior equities. *Davis v. Duke of Marlborough*, 2 Swanst. 118; *Berney v. Sewell*, 1 Jac. & W. 648; *Cortleyou v. Hathaway*, 11 N. J. Eq. 39; *Anonymous*, 6 Ves. Jr. 287; *Angel v. Smith*, 9 Ves. Jr. 836. The rights of a prior mortgagee may be asserted by a suit at law or by applying to be examined *pro inter esse suo*.

In *Oliver v. Decatur*, 4 Cranch, C. C. 458, in a suit to foreclose a legal mortgage, the court refused to grant an injunction and appoint a receiver where the mortgagor was in possession, receiving the rents and profits, the defendant being in no default for not answering.

In *Best v. Schermier*, 6 N. J. Eq. 154, the court refused to appoint a receiver on the filing of a bill to foreclose a mortgage, holding that the mortgagor was entitled to the rents while he was in possession of the premises by his tenants.

In *Cortleyou v. Hathaway*, 11 N. J. Eq. 39, it is held that the rule of New York where premises are inadequate security and the mortgagor is insolvent the court will appoint a receiver has not been adopted in the state of New Jersey by the chancery courts, on the ground that the first mortgagee having the legal right to the rents and profits has his remedy at law by eject-

ment. That a subsequent mortgagee has a better right to a receiver because he has no right to possession at law as against his prior mortgagee, and if the first mortgagee refuses to exercise his legal right the court may interfere on application of the subsequent mortgagee, but without prejudice to the prior mortgagee or other incumbrancer, and the receiver will be directed in such case to keep down the interest of the prior incumbrance. It was also held that mere inadequacy in the value of the mortgaged premises and insolvency of the mortgagor did not constitute sufficient ground for the appointment. In any case, however, the appointment is made with great caution and where there is a necessity for it.

In *Frisbie v. Bateman*, 24 N. J. Eq. 28, it is held that in an ordinary foreclosure suit mere inadequacy in value and insolvency of the mortgagor are not a sufficient foundation for the appointment of a receiver. See also *Best v. Schermier*, 6 N. J. Eq. 154. This decision is based upon the ground that where a man takes a mortgage security for his debt and permits the mortgagor to remain in possession, if there is default in payment the mortgagee must appropriate the property in the usual way to the payment of the debt. If he is a first mortgagee and wishes possession he must take his legal remedy by ejectment. If he is a second mortgagee he takes his security with the disadvantage of a second incumbrancer.

In *Mahon v. Crothers*, 28 N. J. Eq. 567, the court say: "It is very clear that when the first mortgagee has come into this court to foreclose his mortgage and presents a case which would entitle a subsequent mortgagee, according to the practice, to a receiver it is not according to the principles and practice of this court to refer him

to the courts of law for means to reach the rents and profits. The complainant in this case shows that he has no personal security for his mortgage debt; that the mortgaged premises are insufficient security; that the mortgagor who is in receipt of the rents and profits not only has not kept down the interest but has not paid taxes, whereby a lien on the premises therefor paramount to that of the mortgage and bearing a high rate of interest has been created and still exists; a lien which unless the property be redeemed therefrom will extinguish the mortgage, he is entitled to a receiver."

In *Brasted v. Sutton*, 80 N. J. Eq. 462, it appeared that an application was made through a court of equity to aid a mortgagee who was prosecuting an action at law to obtain possession of the property under his mortgage and where it appeared that the mortgagor was insolvent and had removed from the premises and given possession of the premises to another who occupied them for his own use without paying rent, and it appeared also that the mortgagor had committed waste and threatened to commit more and that the premises were insufficient security, a receiver was appointed.

In *Warwick v. Hammell*, 82 N. J. Eq. 427, a second mortgagee obtained an order for the sale on foreclosure the mortgagor being in possession of the premises and insolvent and no taxes or interest on any of the incumbrance having been paid for three years, the second mortgagee was held to be entitled to the appointment of a receiver pending the litigation.

Williams v. Robinson, 16 Conn. 517. The foregoing decisions in New Jersey are not in harmony with the general rule prevailing in the different states where the mortgagor is regarded as the owner of the legal title until

foreclosure. In such states a receiver will be appointed upon the application of the mortgagee after default without reference to the legal rights of the mortgagee whenever adequate equitable grounds for the mortgagee's relief are shown, such as that the premises are an inadequate security for the debt and the mortgagor or other person in possession who is personally liable for the indebtedness is unable to pay the deficiency arising under the sale.

See also Alabama: *Scott v. Ware*, 65 Ala. 174; *Lehman v. Tallahassee Mfg. Co.* 64 Ala. 567.

Arkansas: *Price v. Dowdy*, 34 Ark. 285.

Iowa: *White v. Griggs*, 54 Iowa, 650; *Barnett v. Nelson*, 54 Iowa, 41; *Mylon v. Davenport*, 51 Iowa, 588; *Sleeper v. Iacelin*, 59 Iowa, 379.

Illinois: *Haas v. Chicago Bldg. Soc.* 89 Ill. 498.

Indiana: *Hursh v. Hursh*, 99 Ind. 500; *Ponder v. Tate*, 96 Ind. 330.

Kentucky: *Woolley v. Holt*, 14 Bush, 788.

Michigan: *Brown v. Chase*, Walk. Ch. (Mich.) 43.

Mississippi: *Myers v. Estell*, 48 Miss. 373, per Simrall, J.; *Whitehead v. Wooten*, 43 Miss. 523, 526; *Phillips v. Kiland*, 52 Miss. 721.

New Jersey: *Warwick v. Hammell*, 82 N. J. Eq. 427.

New York: *Bank of Ogdensburg v. Arnold*, 5 Paige, 39; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Warner v. Gouverneur*, 1 Barb. 36, 38; *Jenkins v. Hinman*, 5 Paige, 309; *Syracuse City Bank v. Tallman*, 81 Barb. 201; *Patten v. Accessory Transit Co.* 4 Abb. Pr. 235, 13 How. Pr. 502; *Bolles v. Duff*, 35 How. Pr. 481; *Smith v. Tiffany*, 13 Hun, 671; *Hollenbeck v. Donell*, 29 Hun, 94, 94 N. Y. 842.

(b) Where by the terms of the mortgage no right to a receiver is given.¹

North Carolina: *Kerchner v. Fairley*, 80 N. C. 24; *Durant v. Crowell*, 97 N. C. 367.

Tennessee: *Henshaw v. Wells*, 9 Humph. 568.

United States: *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 105, 80 L. ed. 905; *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 27 L. ed. 609; *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163; *Cone v. Combs*, 18 Fed. Rep. 576, 5 McCrary, 651.

Wisconsin: *Schreiber v. Carey*, 48 Wis. 208; *Morris v. Branchaud*, 52 Wis. 187; *Finch v. Houghton*, 19 Wis. 150.

In *Hill v. Robertson*, 24 Miss. 368, a failure to pay a mortgage vests the legal title in the mortgagee and carries with it the right to the possession of the mortgaged premises, thus giving the legal possession to the person who holds the legal title. See also *Hyman v. Kelly*, 1 Nev. 179.

In *Brown v. Chase*, Walk. Ch. (Mich.) 43, it is held that before appointing a receiver of mortgaged premises in a suit for foreclosure of a mortgage the court must be satisfied, *first*, that the premises are insufficient to pay the debt, and *second*, that the party personally liable is insolvent so that an execution for the balance due from the sale would be unavailing. And see *Haas v. Chicago & Bldg. Soc.* 89 Ill. 498.

¹In *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163, the mortgage contained no provision for the payment of rents and profits of the mortgaged premises while the mortgagor remained in possession, but it was held that the mortgagee was not entitled to the rents and

profits of the mortgaged premises as against the owner of the equity of redemption until such mortgagee takes the actual possession or until it is taken in his behalf, even though the income may be expressly pledged as security for the mortgage debt with the right in the mortgagee to take possession upon failure of the mortgagor to perform the conditions of the mortgage. In this case the deed did not give the mortgagee or the trustees the right, immediately upon default, to take possession and appropriate the rents of the property, but only gave the trustees authority when such default occurred to sell upon short notice and in that way oust the mortgagor and suspend his right to further appropriate the income of the property, even if the deed had expressly pledged the income as security for the debt named the mortgagor, according to the doctrines of the cases cited would have been entitled to the income until at least possession was demanded under the deed; or until his possession was disturbed by the sale under the deed of trust or in advance of a sale by having a receiver appointed for the benefit of the mortgagee. As was said in *Kountze v. Omaha Hotel Co.* 107 U. S. 395, 27 L. ed. 616, "Courts of equity always have the power where the debtor is insolvent and the mortgaged property is insufficient security for the debt and there is good cause to believe that it will be wasted, or deteriorated, in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver and preserve not only the crops, but the rents and profits for the satisfaction of the debt.

(c) Where the statute gives the mortgagor the right of possession and use until the foreclosure is complete by a sale of the mortgage premises, and sometimes until the expiration of the statutory period of redemption.¹

When justice requires this course to be pursued and it is resorted to by the mortgagee it will give him ample protection." See also *Dow v. Memphis & L. R. R. Co.* 124 U. S. 652, 31 L. ed. 566; *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694; *Grant v. Phoenix Mut. F. Ins. Co.* 121 U. S. 105, 30 L. ed. 905; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 416; *Chinnery v. Blackman*, 3 Dougl. 390; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. ed. 144; *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459, 20 L. ed. 199; *Gilman v. Illinois & M. Teleph. Co.* 91 U. S. 603, 23 L. ed. 405.

In *Chadbourn v. Henderson*, 2 Baxt. 460, where the maker of a mortgage by its express stipulation is allowed to retain possession of the property until foreclosure, it is held that he is entitled to the rents, and a receiver should not be appointed in such case.

¹In *White v. Griggs*, 54 Iowa, 650, it is held that the mortgagee has a right to the appointment of a receiver only for the property upon which his mortgage is a lien, and then only where there is danger of its being lost or materially injured or impaired in value. He is not entitled to a receiver to take charge of the crops upon mortgage premises. The fact that the debtor has fraudulently disposed of property upon which the creditor had no lien is no ground for the appointment of a receiver to take possession of property upon which he has no lien. See also *Myton v. Davenport*, 51 Iowa, 583.

In *Swan v. Mitchell*, 82 Iowa, 307,

where the provision in the mortgage was for the conveyance of the "tenement, hereditaments, and appurtenances threunto belonging, and the rents, issues, products, and profits thereof," and giving the mortgagee upon the default of the mortgagor in the payment of interest or of other covenants mentioned the right to take possession of the property and rent or cultivate the same, is not sufficient ground of itself in a foreclosure proceeding to warrant the appointment of a receiver of the property during the period of redemption as against a lessee in possession thereof under a lease covering such period and for which the rent has been paid.

In *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* 37 Fed. Rep. 286, 8 L. R. A. 90, it was held that mere disuse of a manufacturing plant under an agreement with other manufacturers to restrict production, though attended with decay and dilapidation inseparable from disuse, is not such destruction or waste as entitles the mortgagee to ask for a receiver. To justify such an appointment the waste must be serious and the danger of destruction or impairment of the security imminent. *Pullman v. Cincinnati & O. A. L. R. Co.* 4 Biss. 47; *Morrison v. Buckner*, Hempst. 442; *Beverly v. Brooke*, 4 Gratt. 187; *Wagar v. Stone*, 36 Mich. 364. In the latter case it was held that the mortgage in Michigan conveyed no title to the mortgagee, but is a security merely for the debt, and the mortgagee before foreclosure has no legal interest in the mortgaged premises

(d) Where the allegations of the bill or petition upon which the appointment of a receiver is sought, are denied, or where the

and is not entitled to the possession. See also *Lee v. Clary*, 38 Mich. 223; *Hazeltine v. Granger*, 44 Mich. 503; *Reading v. Waterman*, 46 Mich. 107; *Morse v. Byam*, 55 Mich. 594.

The mortgagor being entitled under the statute (Comp. L. § 6263) to possession and subsequently to the rents and profits of the mortgaged premises until such time as his title is divested by a perfected foreclosure it is not competent to cut short his right in this regard by means of a receiver. *Wagar v. Stone*, *supra*; and a receiver cannot be appointed after default to take the rents and profits, although the mortgage so stipulates. *Hazeltine v. Granger*, 44 Mich. 503, and see *Beecher v. Marquette & P. Rolling Mill Co.* 40 Mich. 307. If, however, the mortgagor voluntarily puts the mortgagee in possession he cannot treat the possession as wrongful and bring ejectment without notice or payment. *Reading v. Waterman*, 46 Mich. 107; *Morse v. Byam*, 55 Mich. 594. See also upon the doctrine of the rights of the mortgagor and mortgagee in this state, *Hogsett v. Ellis*, 17 Mich. 363; *Ladus v. Detroit & M. R. Co.* 18 Mich. 380; *Van Husean v. Kanouse*, 18 Mich. 303; *Caruthers v. Humphrey*, 12 Mich. 270.

It will be noticed that in Michigan (Comp. L. § 6263) the statute forbids ejectment by the mortgagee before a foreclosure absolute. It is also held in *Beecher v. Marquette & P. Rolling Mill Co.* *supra*, that an order denying the appointment of a receiver in a foreclosure suit is interlocutory and therefore not appealable. And in the same case it is held, also, that if the default is not admitted it cannot be determined upon a motion to appoint a receiver.

In *Guy v. Ide*, 6 Cal. 99, under a statute which forbids a mortgagee from recovering a mortgaged estate and confines his remedy to a foreclosure, it was held that the same reason does not exist, as by the English rule, for appointing a receiver to collect the rents and profits pending the litigation for the reason that the mortgage is considered as only a security for the debt, and that the estate remains that of the mortgagor in the character of owner, and must continue to remain so with all the incidents of ownership until by a foreclosure and sale a new owner is substituted.

In *Hyman v. Kelly*, 1 Nev. 179, it is said that courts of equity upon the filing of a bill to foreclose a mortgage have usually appointed a receiver where there was an allegation that the property mortgaged was insufficient to pay the debt and the mortgagor was insolvent. If in addition to this it appears there was a specific pledge of the rents and profits to keep down the interest and they were being diverted, it always furnished a strong additional reason for the appointment of a receiver. That the remedy in Nevada of ejectment having been abolished by statute and the mortgagee confined to his remedy to foreclose, it was held to be reason for a more liberal exercise by the chancellor of the power to appoint a receiver, holding contrary to the doctrine in California under a similar statute in the case of *Guy v. Ide*, 6 Cal. 99, and the appointment of a receiver was sustained.

In *Adair v. Wright*, 16 Iowa, 385, it was held that where the evidence showed that the mortgaged property was not going to waste or in need of

amount due is in dispute and the answer denies the allegations of the plaintiff as to the inadequacy of the security.¹

(e) Where the insufficiency of the property covered by the mortgage is shown, but the proof fails to show that the mortgagor or other person liable for the mortgage debt is insolvent.²

repairs but that it was in comparatively a good state of preservation, it was held that the order appointing a receiver should be vacated.

¹ In *Callanan v. Shaw*, 19 Iowa, 183, it was held that a receiver would not be appointed on the application of a mortgagee to take possession of mortgaged premises, where it does not clearly appear that the whole mortgaged premises are insufficient in value to pay the debt, or that the court should take control of the estate to protect the rights of a party who has a clear, strong claim against it. The court say: "Formerly the mortgagee held the legal title and was entitled to possession. Under our law the rule is changed and the mortgagor has or is entitled to both, and this is emphatically so as to the homestead. Now the rule has been from an early date at common law, as between the mortgagee and mortgagor, that if the mortgagee says by his answer (in a bill to redeem) that anything is due him, the court will not disturb the possession; will not, upon the application for the appointment of a receiver, settle and ascertain the accounts between them. See *Quarrell v. Beckford*, 13 Ves. Jr. 377; *Codrington v. Parker*, 16 Ves. Jr. 469; *Berney v. Sewell*, 2 Jac. & W. 629; *Rosse v. Wood*, 2 Jac. & W. 558. In this state the mortgagor being in possession, this possession, under the legal estate, should not be disturbed by the appointment of a receiver, unless indeed in case of fraud clearly proved or of danger to the mortgagee (having a strong claim), if the intermediate estate or possession

should not be brought under the care of the court. In any case the receiver is appointed against the holder of the legal title with reluctance." *Lloyd v. Passingham*, 19 Ves. Jr. 59; *Smith v. Smith*, 2 Younge & C. 351; *Knight v. Dupleissis*, 2 Ves. Jr. 280; *Tolderry v. Colt*, 1 Younge & C. 621.

In *Sea Ins. Co. v. Stebbins*, 8 Paige, 567, it is held that to authorize the court to interfere and appoint a receiver, where there is a mortgagor or other party to the suit who is personally liable for the debt secured by the mortgage, in case the amount raised upon the sale shall be found insufficient to pay the debt and costs, the party applying for such receiver must not only satisfy the court that there is a probability that the mortgaged premises will not sell for enough to satisfy the decree, but also that the party who is thus individually liable is himself irresponsible for the probable amount of such anticipated deficiency, after paying all his other just debts.

² In *Pullan v. Cincinnati & C. A. L. R. Co.* 4 Biss. 35, it is held that a receiver should only be appointed in a strong case, and in no case of a mortgage ought a receiver to be appointed if it is not clear that on a foreclosure the mortgaged property will not bring enough money to pay the debt, interest and costs.

In *Morrison v. Buckner*, Hempst. 442, the general rule is said to be that receivers will not be appointed in mortgage foreclosure cases, unless it clearly appears that the security is inadequate or there is immediate danger

(f) Where the right of plaintiff to a foreclosure is not clearly shown.¹

of the waste, removal or destruction of the mortgaged property, or that the rents and profits have been expressly pledged for the debt. See *Shotwell v. Smith*, 8 Edw. Ch. 588.

In *Astor v. Turner*, 2 Barb. 444, it was held that where a bill is filed to foreclose a mortgage on leasehold premises, which are a scant security for the debt and the mortgagor is insolvent and his assignee in possession, a receiver will be appointed and the owner of the equity of redemption be directed to pay the occupation rent.

In *Myers v. Estell*, 48 Miss. 872, it is said that if the mortgagee or beneficiary in a trust deed do not stipulate for the rents and profits of the estate conveyed, ordinarily he is not entitled to them, nor has he any claim upon them until he has taken possession, and that ordinarily, in the absence of such a stipulation that the mortgagee shall have the rents and profits, he has no claim thereto merely on the ground that the debt is due and the title has become absolute, but is only entitled to a receiver for the collection and appropriation of the rents where the property is insufficient to pay the debt, and the mortgagor is insolvent and unable to pay any deficiency that might remain after the sale of the property mortgaged.

In *Quincy v. Cheeseman*, 4 Sandf. Ch. 404, it is held that where mortgaged premises are so situated that they cannot be sold in parcels, a receiver of the rents will be appointed on a part only of the mortgage debt falling due, provided the other requisite facts be made to appear, to wit: the insufficiency of the premises in value to pay the debt and costs and the insolvency or irresponsibility of

the party personally liable to pay the debt.

In *Hyman v. Kelly*, 1 Nev. 179, inadequacy of property to satisfy the lien and insolvency of the mortgagor was held to be a sufficient reason for the appointment of a receiver and that a specific pledge of the rents and profits to keep down the interest, and the diversion thereof, furnished an additional reason for the appointment of a receiver.

In *Brown v. Chase*, Walk. Ch. (Mich.) 43, it is held that before appointing a receiver to take charge of the mortgaged premises in a suit for the foreclosure of a mortgage the court must be satisfied, first, that the premises are insufficient to pay the debt, and second, that the party personally liable is insolvent so that an execution for the balance due after sale would be unavailable, and that security is presumed sufficient until the contrary is shown, but the application must be made within a reasonable time or the delay will be construed as a waiver of the right to make the application.

¹In *Quincy v. Cheeseman*, 4 Sandf. Ch. 405, the court say: "the mortgage debt must also be due so as to entitle the complainant to a foreclosure of the premises over which he seeks the appointment of a receiver."

In *Hollenbeck v. Donnell*, 94 N. Y. 342, it appeared that about one sixth of the mortgage debt was due and the premises were divided into two nearly equal parcels which could be sold separately without injury to the parties interested. It was held that assuming the appointment of a receiver of the rents and profits was proper in the absence of a specific pledge thereof

(g) Where the plaintiff has no equitable standing in court by reason of his failure to keep his agreement respecting the consideration for which the mortgage was given.¹

yet plaintiff was not entitled to a receivership for the protection of that portion of the debt which was not yet due or of that portion of the premises as to which his rights to sell have not accrued and that plaintiff was not entitled to a receivership of the whole of the premises but only to one of the parcels. *Hollenbeck v. Donnell*, 29 Hun, 94, reversed. See also *Bank of Ogdensburg v. Arnold*, 5 Paige, 40.

In *Morris v. Branchaud*, 52 Wis. 187, a bill to foreclose a mortgage was filed but it did not allege waste, failure to pay taxes, or diminution of the value of the security or increase of the mortgage debt; but on the contrary it was shown that the debt had been reduced since the securities were taken and less than half of the remaining debt was due, including only a small amount of interest and the property was salable in parcels. It was held that a receiver should not be appointed, the party liable for the payment of the indebtedness not appearing to be irresponsible.

In *Bank of Ogdensburg v. Arnold*, *supra*, it appeared that the whole amount of the mortgage was not due and the premises could be sold in parcels without injury to the interest of the parties, and it was held that only so much of the premises as would be sufficient to satisfy the amount then due with costs should be sold, though the remaining portion of the premises would be insufficient to satisfy the money yet to become due. It was also held that where the mortgagee has neglected to take a specific pledge of the rents and profits of the mortgaged premises for the security of the

debt before it becomes due he has no equitable right to such rents and profits in the mean time.

In *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510, it is held that pending a suit to foreclose a mortgage if the mortgaged premises are indivisible, the debtor insolvent and the property sold for taxes a junior mortgagee defendant whose debt is not due having filed a counterclaim setting up his demand, may on petition showing the facts and that the property is less in value than the amount of incumbrance may have an interlocutory order appointing a receiver to collect the rents. *Brinkman v. Ritzinger*, 82 Ind. 353.

¹In *McKellar v. Rogers*, 20 Jones & S. 360, a mortgage was given to secure advances to be used in the erection of buildings on the mortgaged premises, which advances the mortgagee failed to make, as required by the mortgage, in consequence whereof the mortgagor was compelled personally to advance large sums of money to complete the work, and then to save his credit was compelled to sell the houses erected at a large reduction from their actual value. It was contended that this was an adequate defense to the appointment of a receiver but the evidence in support of the objection was vague and indefinite, from which the court was unable to determine whether the defense was valid or not, there being in the mortgage a covenant pledging the rents and profits. This case was afterwards affirmed in the court of appeals but upon other grounds. 109 N. Y. 468.

(h) Where pending an appeal the appeal bond constitutes ample protection.¹

(i) Where the defendant by a deposit in court, or otherwise, secures the plaintiff.²

(j) Where the property over which a receiver is sought is a statutory homestead and the defendant entitled to the occupancy and use thereof.³

(k) Where the plaintiff is guilty of *laches* in making his application.⁴

§ 174. Inadequacy of security as ground for.

Inadequacy of security is the most usual ground, in foreclosure proceedings, upon which application for a receiver of the mortgaged premises is based. A careful examination of the adjudged cases bearing upon this subject, it is believed, will result in the establishment of the following principles:

(a) Inadequacy of security, such as warrants the appointment of a receiver, consists of two separate elements, each of which is necessary to be established by adequate proof: (1) The insufficiency in value of the mortgaged premises to pay the debt, in-

¹In *Adair v. Wright*, 16 Iowa, 385, it was held that the appointment of a receiver of mortgaged property after final decree and foreclosure proceedings is unusual and if allowed at all must be supported by strong showing of facts, and if the evidence showed that the mortgaged property was not going to waste or in need of repairs, but in a comparatively good state of preservation, it was held that the order appointing a receiver should be vacated and especially where the plaintiff had approved security for the whole debt on the appeal bond.

²*Welch v. Henry*, 32 Kan. 425.

³In *Callanan v. Shaw*, 19 Iowa, 183, a receiver was refused on the application of a mortgagee to take possession of mortgaged premises, where it did not clearly appear that the whole mortgaged premises were insufficient in value to pay the debt or

that the court should take control of the estate to protect the rights of a party who had a clear strong claim against it. It was doubted whether in any case a receiver should be appointed to take possession and charge of the mortgagor's homestead pending proceedings to foreclose the mortgage.

In *Cone v. Combs*, 18 Fed. Rep. 576, great doubt was expressed as to whether the defendant's possession of the homestead should be interfered with until after a sale and deficiency decree rendered and in this case it appeared that the mortgagor and his family were not occupying the premises as a homestead, but was deriving an income from it as a homestead. See also *Hoge v. Hollister*, 8 Baxt. 533.

⁴See *Cone v. Combs*, 18 Fed. Rep. 576.

terest and costs. (2) The insolvency of the mortgagor, his grantee, or other person liable for the payment of the mortgage debt, or at least, as has been held in some cases, such a degree of irresponsibility financially as renders the collection of a deficiency judgment against him improbable.¹

¹In *Warner v. Gouverneur*, 1 Barb. 36, where a mortgagee had not provided for keeping down the accruing interest upon the mortgage by securing a lien upon the rents and profits, a court will, it is held, interfere with the mortgagor's possession prior to a decree of foreclosure, and appoint a receiver of the rents and profits where it appears that the premises are inadequate security for the debt and the mortgagor, or other person in possession, is insolvent, but in any such case the receiver will not be appointed upon mere allegation that the mortgaged premises are not an adequate security for all just incumbrances thereon. The mortgagee applying for a receiver must allege in his bill that the premises are not an adequate security for the amount due him.

In *Astor v. Turner*, 2 Barb. 444, a bill was filed to foreclose a mortgage of leasehold premises which were scanty security for the debt, and the mortgagor was insolvent and his assignee in possession, a receiver was appointed and the owner of the equity of redemption directed to pay an occupation rent.

In *Sea Ins. Co. v. Stebbins*, 8 Paige, 565, it was held that the plaintiff must state that the premises are not of sufficient value to satisfy his debt and costs, and that the mortgagor or other person who is personally liable for the payment of the mortgage debt is irresponsible or unable to pay the anticipated deficiency. He must also show who is in possession of the mortgaged premises, as a receiver can only be ap-

pointed in a case where the person in possession of the mortgaged premises, by himself or his tenants, is a party to the suit.

In *Quincy v. Cheeseman*, 4 Sandf. Ch. 405, it was held to be a requisite fact to be made to appear, *first*, that the premises were insufficient in value to pay the debt and costs, and *second*, the insolvency or irresponsibility of the person liable to pay the debt.

In *Hollenbeck v. Donnell*, 94 N. Y. 342, it is said that in New York the right to a receiver of the rents and profits is placed, not upon the mortgagee's legal right to the possession of the mortgaged premises and therefore his legal rights to the rents thereof, but his right was inherent in the court of chancery before the code of procedure was adopted, and was continued by that code under subd. 5, § 244, and was not abrogated by a provision of the code, § 718, defining cases in which receivers may be appointed, but on the contrary is reaffirmed by the general provisions of the code, § 4, declaring that each of the courts therein named shall continue to exercise the jurisdiction and powers now vested in it, except as otherwise prescribed.

In *Commercial & Sav. Bank v. Corbett*, 5 Sawy. 172, it was held that the facts essential to the appointment of a receiver need not be pleaded, but may be shown by affidavit and at the hearing, and that a prayer for a receiver is unnecessary. This decision is strangely at variance with a great many well considered cases.

In *Schreiber v. Carey*, 48 Wis. 208 the mortgage included the homestead, and neither the interest nor principal had been paid, and the debt was larger than the sum for which the premises could be sold, and there were other unsatisfied judgments against the mortgagor, it was held that in the absence of rebutting evidence, the insolvency of the mortgagor was sufficiently established. In this case, however, in addition to the foregoing facts, it was further shown that the mortgagor was wilfully neglecting to pay the taxes on the land.

In *Kerchner v. Fairley*, 80 N. C. 24, it appeared that the property conveyed was inadequate to pay the debt, and that the mortgagor in possession was insolvent. Held, that the appointment of a receiver was proper, though the plaintiff denied an alleged payment of the debt and the existence of assets in his hands applicable thereto. *Ten Broeck v. Orchard*, 74 N. C. 409; *Rollins v. Henry*, 77 N. C. 467. It is incumbent, however, that the plaintiff should establish an apparent right to the property in litigation, and where it is neither alleged nor shown that there is danger of waste or injury to the property or loss of the rents and profits by reason of the insolvency of the party in possession, a receiver will not be appointed. *Twitty v. Logan*, 80 N. C. 69.

In *Durant v. Crowell*, 97 N. C. 367, it was held that where the plaintiff establishes a *prima facie* right to property, which is not rebutted by the defendant, a receiver should be appointed where it is shown that there is danger of loss of the rents and profits, and in such case the value of the property in controversy ought not to be considered in passing upon the question of the solvency of the defendant. In this case the defendant was permitted to

execute a bond to secure the rents and profits and such damages as might be adjudged to the plaintiff, in lieu of a receiver.

In *Dunlap v. Hedges*, 35 W. Va. 287, it appeared that judgment had been rendered against the mortgagor, a second mortgage given upon the property, and it was alleged that the mortgagor was insolvent and had been allowing the mortgaged premises to run down and there was waste, a receiver was appointed to rent and preserve the property until the conflicting claims should be adjudged.

In *Grant v. Phœnix Mut. L. Ins. Co.* 121 U. S. 105, 30 L. ed. 905, it is held upon the authority of *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 395, 27 L. ed. 609, 616, as follows: "Courts of equity always have the power where the debtor is insolvent and the mortgaged property is an insufficient security for the debt and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor by cutting off timber, suffering dilapidation, etc., to take charge of the property by means of a receiver and preserve not only the *corpus*, but rents and profits for the satisfaction of the debt."

In *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510, it was held in a foreclosure proceeding where it appears that the mortgaged premises are indivisible, the debtor insolvent and the property sold for taxes, a junior mortgagee defendant whose debt is not due, having filed a counterclaim setting up his demand and showing that the property is less in value than the amount of incumbrance, may have a receiver.

A receiver appointed at the instance of a mortgagee is not entitled to the rents and profits in the possession of the mortgagor, accruing from the mortgaged property prior to his ap-

(b) The establishment of one of these elements and the failure to establish the other, is fatal to the appointment.¹

pointment. *Alabama Nat. Bank v. Murry Lee Coal & R. Co.* (Ala.) 19 So. 404.

In determining whether a receiver of mortgaged property shall be appointed pending a foreclosure suit, because of the inadequacy of the property to pay the debt, the proper estimate is that placed on the property at the time of hearing instead of at some other time. *Jackson v. Hooper* (Ala.) 18 So. 254.

¹ In *Sea Ins. Co. v. Stebbins*, 8 Paige, 565, the court say: "To authorize the court to interfere and appoint a receiver where there is a mortgagor or other party to the suit who is personally liable for the debt secured by the mortgage in case the amount raised upon sale shall be found insufficient to pay the debt and costs, the party applying for such receiver must not only satisfy the court that there is a probability that the mortgaged premises will not sell for enough to satisfy the decree, but also that the party who is thus individually liable is himself irresponsible for the probable amount of such anticipated deficiency after paying all his other just debts."

In *Morris v. Branchaud*, 52 Wis. 187, where there was nothing in the record indicating that the mortgagor was irresponsible, it was held that this was an insurmountable objection to the appointment of a receiver.

In *Warner v. Gouverneur*, 1 Barb. 86, there was no doubt from the evidence of the mortgagor's insolvency, but there was a good deal of doubt as to the inadequacy of the security of the mortgaged premises and it was held that a receiver should not be appointed.

In *Myers v. Estell*, 48 Miss. 372-403,

it is said that a better rule is to grant or refuse a receiver as it may or may not be an essential means to pay the debt; that there can be no necessity for this auxiliary remedy if the mortgagor is solvent and able to pay any deficiency. In such case the creditor ought to be left to his legal remedy to get at the rents.

In *Brown v. Chase*, Walk. Ch. (Mich.) 43, the court say: "The court must be satisfied, before making the appointment, that the mortgaged premises are insufficient to pay the mortgage debt and that the mortgagor or other party to the suit who is personally liable for this payment is insolvent or out of the jurisdiction of the court so that an execution against him for the balance that should remain due after a sale of the mortgaged premises would be unavailable.

In *Cone v. Combs*, 18 Fed. Rep. 576, the court say: "It must clearly appear that the mortgagor is hopelessly insolvent and the property inadequate security for the debt to warrant the appointment of a receiver. If the property mortgaged is of much less value than the debt and accrued costs and the mortgagor who is personally liable is insolvent the mortgagee is usually entitled to a receiver, and this court heretofore granted this relief when these elements have been clearly found to exist. In this case the proof is beyond doubt that the personal liability of the mortgagor is gone, and should a deficiency exist after sale of the mortgaged premises it could not be collected. The mortgagor has been discharged as a bankrupt and is not personally liable for this debt. But it is not satisfactorily proved that the mortgaged property

(c) In the absence of deterioration in the value of the mortgage premises and property from fire or other extraordinary causes, the presumption is that the value thereof is adequate security for the payment of the debt, interest and costs.¹

(d) The above rule as to the inadequacy of the security as a

is inadequate security. The burden is upon the mortgagee to establish this fact as the presumption is, the property when mortgaged was ample security and this presumption continues until the contrary is proved."

¹ See *Cone v. Combs*, *supra*.

Mortgagors who have stipulated in the mortgage for the appointment of a receiver, upon default in payment, to collect the rents and profits, cannot complain of such appointment after a default, especially where the mortgage security is insufficient. *Clark v. John A. Logan Mut. L. & Bldg. Assn.* 58 Ill. App. 311.

A receiver of a newspaper will not be appointed in an action to foreclose a mortgage thereon, notwithstanding the defendant's insolvency, where defendant alleges that he is not indebted to plaintiff, the property is steadily increasing in value, and the appointment of a receiver would absolutely destroy its value and render the property worthless as a newspaper. *Whitehead v. Hale* (N. C.) 24 S. E. 360.

A receiver will not be appointed to take possession of property on behalf of subsequent lienholders, where it is in the possession of one to whom it has been transferred as owner by the letter of the transfer to extinguish a prior vendor's lien, and whose worst position is that of a mortgagee in possession. *United States v. Masich*, 44 Fed. Rep. 10.

Pending a proceeding to foreclose a mortgage a receiver will not be appointed to take charge of the mortgaged premises, where it does not

clearly appear that the whole mortgaged premises are insufficient in value to pay the debt, so that the court should take control of the estate to protect the rights of a party having a clear, strong claim against it. *Callanan v. Shaw*, 19 Iowa, 183.

A provision in a mortgage, that the mortgagee may take possession of the premises and rent them, accounting for net profits only, without depriving him of the right to foreclose, does not contemplate the appointment of a receiver after foreclosure to collect the rents and profits during the time allowed for redemption. *Swan v. Mitchell*, 82 Iowa, 307.

While it is proper to appoint a receiver to continue a business already established, but it is not proper to appoint a receiver to begin a business if neither of the parties have taken steps thereto. *Merrell v. Pemberton*, 62 Ga. 29.

A receiver should not be appointed of property on which a lien of a mortgage exists if the property is not ample to pay the receiver his compensation over the mortgage. This when mortgagee does not apply. *Lammon v. Giles*, 3 Wash. Ter. 117.

Upon the application of the mortgagees after condition broken pending bill to foreclose, unless the property, if permitted to remain in control of mortgagor, is likely to be wasted or diverted so as to impair the mortgagee's claim, a receiver will not be appointed. *Theever v. Rutland & B. R. Co.* 39 Vt. 653.

ground for the appointment of a receiver, in the absence of proof of further equitable grounds, has not been adopted in some states, as in New Jersey, on the ground that the mortgagee has an adequate legal remedy,¹ while in other states, as in California and South Carolina, the general doctrine has not been enforced, upon the ground that the mortgagor remains the owner of the legal estate, even after condition broken, until his estate is divested by a foreclosure, sale and deed thereunder, and is consequently, during such period, entitled to the rents and profits. In Iowa and Michigan the mortgagor is entitled to the use and occupation of the mortgaged premises until the expiration of the statutory period of redemption.²

¹In *Ostwood v. Coffin*, 80 N. J. Eq. 450, where it was admitted that there was no personal security for the payment of the mortgage debt; that the premises were insufficient security; that the property was rented and the rents not applied in payment of taxes, or the interest, a receiver was appointed. And see also *Brasted v. Sutton*, 80 N. J. Eq. 462, where waste had also been committed and was threatened. *Cortleyou v. Hathaway*, 11 N. J. Eq. 39; but in *Frisbie v. Bateman*, 24 N. J. Eq. 28, it was held that mere inadequacy of security and insolvency were not a foundation for a receiver on the authority of *Cortleyou v. Hathaway*, *supra*; and *Best v. Schermier*, 6 N. J. Eq. 154. A contrary rule exists in New York. *Warner v. Gouverneur*, 1 Barb. 88; *Bank of Ogdensburg v. Arnold*, 5 Paige, 39; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Sea Ins. Co. v. Stebbins*, 8 Paige, 566. See also *Oliver v. Decatur*, 4 Cranch C. C. 458; *Union Trust Co. v. St. Louis, I. M. & S. R. Co.* 4 Dill. 114; *Williamson v. New Albany, etc. R. Co.* 1 Biss. 198.

A receiver of rents and profits will not be appointed at the instance of a mortgagee of the land, no express lien having been given upon the rents and

profits, although the mortgaged estate be inadequate to secure the loan and the mortgagor insolvent. *Phoenix Mut. L. Ins. Co. v. Grant*, 3 MacArth. 220.

²In *West v. Conant*, 100 Cal. 231, it is held that a purchaser at a foreclosure sale is entitled to the rents and profits, or the value of the use and occupation, from the time of sale until redemption, still the debtor is entitled to remain in possession until the expiration of the redemption period, and is entitled to the crops. *White v. Griggs*, 54 Iowa, 650.

In *Guy v. Ide*, 6 Cal. 99, it is said: "Our statute forbids a mortgagee from recovering the mortgaged estate and confines his remedy to foreclosure. . . . The mortgage is considered as only a security for the debt; the estate remains that of the mortgagor in the character of owner, and must continue to remain so, with all the incidents of ownership until, by a foreclosure and sale, a new owner is substituted." *McMillan v. Richards*, 9 Cal. 410.

In *Hardin v. Hardin*, 34 S. C. 77, it is held that as the mortgagor remains the owner of the mortgaged land, the rents belong to him until a foreclosure, and the mortgagee has

no lien on the rents and profits, unless it is so stipulated in the mortgage. *Reeder v. Dargan*, 15 S. C. 185; *Seignious v. Pate*, 32 S. C. 184.

A receiver of the rents of mortgaged premises, appointed in an action to foreclose the mortgage on the ground of the insufficiency of the security, is entitled to the rents accruing during the pendency of the action and before his appointment, as against a receiver in supplemental proceedings maintained against the mortgagor. *Donlon & M. Mfg. Co. v. Cannella*, 89 Hun, 21.

A mortgagee is not entitled, before foreclosure, to the appointment of a receiver to preserve the rents and profits, unless the lands are of insufficient value to secure the mortgage debt. *Lindsay v. American Mortg. Co.* 97 Ala. 411; *Blondheim v. Moore*, 11 Md. 865; *Moritz v. Müller*, 87 Ala. 381.

A receiver will not be appointed in Michigan in a suit by persons succeeding to the right of a mortgagee of a reversioner's interest in land, against the life tenant, to establish a lien for taxes paid by complainant on the premises, and to compel the payment of other taxes assessed thereon, the appointment of a receiver not being the proper remedy, under the Michigan method of enforcing the collection of unpaid taxes upon lands and of foreclosing liens. *Jenks v. Horton*, 96 Mich. 18. Otherwise in New York. See *Cairns v. Chabert*, 3 Edw. Ch. 812; *Sidenberg v. Ely*, 90 N. Y. 257.

The right of a mortgagor to the rents and profits *pendente lite* is a substantial one, under the laws of Michigan (How. St. § 7847), which must be recognized in the courts of the United States in administering the rights of the parties to a mortgage; and they cannot, therefore, appoint a

receiver to take the rents and profits to apply on the mortgage prior to the completion of foreclosure by sale and confirmation, although the security is inadequate. *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* 37 Fed. Rep. 286, 3 L. R. A. 90.

In *Swan v. Mitchell*, 82 Iowa, 307, it was held where the mortgage covered the "rents, issues, products and profits thereof," and gave the mortgagee the right, upon default, to take possession and rent or cultivate the same, this of itself was not ground for a receiver during the redemption period. *White v. Griggs*, 54 Iowa, 650; *Paine v. McElroy*, 78 Iowa, 81; *Hazeltine v. Granger*, 44 Mich. 508; *Beecher v. Marquette & P. Rolling Mill Co.* 40 Mich. 307; *Wagar v. Stone*, 86 Mich. 864; *Newton v. McKay*, 30 Mich. 380; *Humphrey v. Hurd*, 29 Mich. 44; *Hogsett v. Ellis*, 17 Mich. 863; *Newton v. Sly*, 15 Mich. 391; *Van Husean v. Kanouse*, 18 Mich. 303; *Ladus v. Detroit & M. R. Co.* 13 Mich. 380; *Crippen v. Morrison*, 13 Mich. 23; *Caruthers v. Humphrey*, 12 Mich. 270; *Baker v. Pierson*, 5 Mich. 456. See *contra*, *Hollenbeck v. Donnell*, 94 N. Y. 842; *Pasco v. Gamble*, 15 Fla. 562 (see this case as to right of possession of mortgagor); *Jenner-Fust v. Needham*, L. R. 31 Ch. Div. 500.

A receiver cannot be appointed of mortgaged property to take the rents, issues, profits and crops, and apply them in payment of the mortgage, although the mortgage expressly provides therefor, under the Oregon statute providing that a mortgage shall not be deemed a conveyance so as to enable the mortgagee to recover possession without foreclosure and sale, and by which he is not entitled to rents and profits before actual possession. *Thomson v. Shirley*, 69 Fed. Rep. 484.

(e) The inadequacy of security contemplated by the rule above has reference solely to the plaintiff's indebtedness, and does not include other lien indebtedness against the property.¹

(f) The proof must be clear and satisfactory, in order to warrant the court in granting the relief, under the rule under discussion;² but this rule is relaxed if, in addition to the inadequacy of security, other equitable grounds for relief are shown, such as the nonpayment of taxes, insurance premiums, waste, and the like.³

(g) Under the present English practice, rents collected between the date of the certificate under foreclosure judgment and the day fixed for redemption by the mortgagee or receiver, go in reduction of the amount due on the mortgage, but if collected after redemption date they belong to the mortgagee.⁴

§ 175. Same subject continued.

A few observations relative to the causes which have brought about the disagreement noted above may be profitably stated in this connection. In some states the mortgagor is regarded as retaining the legal title to the mortgaged premises, and the mortgagee as being vested only with an equitable title held as security for the indebtedness. In other states the mortgagee is regarded as holding the legal title subject to the defeasance in the mortgage, and of course in such case one condition broken has a right to recover possession in a common law action. Some courts have construed the mortgage as transferring the rents and profits of the

¹ *Warner v. Gouverneur*, 1 Barb. 36.

² *Cone v. Combs*, 18 Fed. Rep. 576; *Burlingame v. Parce*, 12 Hun, 144; *Shotwell v. Smith*, 3 Edw. Ch. 588.

³ *Corley v. Huthaway*, 11 N. J. Eq. 39; *Oldham v. First Nat. Bank*, 84 N. C. 304; *Stockman v. Wallis*, 30 N. J. Eq. 449; *Chetwood v. Coffin*, 30 N. J. Eq. 450.

Where a mortgagor has sold the mortgaged premises, he is not in a position to oppose the appointment of a receiver. *Wall Street F. Ins. Co. v. Loud*, 20 How. Pr. 95.

If the mortgagor is insolvent and

the mortgage premises are cultivated in a wasteful manner, a receiver may be appointed. *Dunlap v. Hedges*, 35 W. Va. 287.

⁴ *Jenner-Fust v. Needham*, L. R. 31 Ch. Div. 500, Affirmed in L. R. 32 Ch. Div. 582. But see *Hoare v. Stephens*, L. R. 32 Ch. Div. 194.

A receiver has no right to purchase the mortgaged premises during the period allowed for redemption, and if he does so will not be entitled to the rents and profits. *Herrick v. Miller*, 123 Ind. 304.

mortgaged premises as part and parcel of the estate granted, while others have looked upon such rents and profits as separate and distinct from the estate conveyed, and inseparable from the use and occupation, and viewed in this latter aspect some courts have maintained that the right of the mortgagor to the rents and profits terminated with sale of the premises under the foreclosure decree and others that the rights of the mortgagor thereto ceased only at the end of the statutory period of redemption. It is probable that the irreconcilable differences noted are due to the methods of construction adopted by different courts, some of them construing the mortgage deed strictly in accordance with its terms, while others from a broader standpoint have given it a more liberal construction in accordance with the actual intention of the parties. One is the legal and the other the equitable construction, one is the express legal intent and the other the unexpressed equitable intent.

§ 176. Over what appointed.

The receivership in mortgage foreclosures is limited to the property embraced in the mortgage,¹ or such portion thereof as may be necessary for the payment of the mortgage indebtedness.² It may be either real property, personal property or a leasehold interest,³ and where the parties in interest are within the jurisdiction the property may be beyond the jurisdiction of the court.⁴ If the mortgage includes the rents, issues and profits and the receiver takes possession he is entitled to the growing crops, in case of a deficiency.⁵ So also in case of a mortgage of chattels, if they

¹ *Wormser v. Merchants' Nat. Bank*, 49 Ark. 117; *Staples v. May*, 87 Cal. 178. If the mortgage embraces a hotel, the receiver may run the hotel in order to prevent an impairment of the security. *Lowell v. Doe*, 44 Minn. 144. Not so however if the good will is not included in the mortgage. *Whitley v. Whallis* [1892] 1 Ch. 64; *St. Louis Car Co. v. Stillwater Street R. Co.* 53 Minn. 129; *Lowell v. Doe*, 44 Minn. 144.

² *Trissilian v. Caniffe*, 4 Ir. Ch. N. S. 390. A receiver may be appointed over the whole of property at the instance of a mortgagee of an undivided

share. *Sumsion v. Creechwell*, 81 Week. Rep. 899; *Wormser v. Merchants' Nat. Bank*, 49 Ark. 117.

³ *Barrett v. Mitchell*, 5 Ir. Eq. 501.

⁴ *Davis v. Barrett*, 13 L. J. Ch. N. S. 304; *Langford v. Langford*, 5 L. J. Ch. N. S. 60; *Shaw v. Shore*, 5 L. J. Ch. N. S. 79.

⁵ *Montgomery v. Merrill*, 65 Cal. 432; and see *Simpson v. Robert*, 85 Ga. 180. In Indiana where, by statute, the mortgagor is entitled to possession, in the absence of a stipulation to the contrary, this gives him the right to the crops and they may be levied on and

are being levied on in the hands of the mortgagor by attachments,¹ but a mortgagee in possession will not be disturbed by a receiver, while a balance remains due him;² or in case of a mortgage of a leasehold interest, where the mortgagor fails to pay rent and an eviction is threatened,³ or where the mortgagor is solvent and has transformed his equity in the premises,⁴ and security is inadequate,⁵ or in case of equitable mortgages as in case of the deposit of title deeds.⁶ A receiver appointed in mortgage foreclosure proceeding where the mortgagor, or other person liable for the mortgage debt, is insolvent is entitled to the rents and profits of the mortgaged premises, not yet paid and accrued.⁷ By the appointment the mortgage becomes entitled to an equitable lien on the rents and profits.

sold by a judgment creditor. This decision is based upon the doctrine that the mortgagee only has a lien upon the property, and that the rights of the receiver are not retrospective. *Favorite v. Deardorff*, 84 Ind. 555. Cf. *Lilly v. Dunn*, 96 Ind. 220; *Bryson v. McCreary*, 103 Ind. 4; *Merritt v. Gibson*, 129 Ind. 155, 15 L. R. A. 277. ¹*Crow v. Red River County Bank*, 53 Tex. 362; *Maish v. Bird*, 59 Iowa, 307.

²*Quinn v. Brittain*, 3 Edw. Ch. 314; *Patten v. Accessory Transit Co.* 4 Abb. Pr. 235, 13 How. Pr. 503; *Bayaud v. Fellows*, 28 Barb. 451; *Washington Iron Works Co. v. Jensen*, 3 Wash. 584.

The judge in vacation has no power, in a suit to foreclose a chattel mortgage, to appoint a receiver and order a sale of the property in advance of the regular foreclosure sale, on the ground that the conditions of the mortgage have not been performed, and that there is danger of the property being materially injured and depreciated in value. *Wilson v. Aultman & T. Co.* 91 Ky. 299. (See Civ. Code Ky. § 299). Cf. *Furlong v. Edwards*, 3 Md. 99.

³*Barrett v. Mitchell*, 5 Ir. Eq. 501.

⁴*Astor v. Turner*, 2 Barb. 44; How. Pr. 225; *Reid v. Middleto* Turn & R. 455; *Smith v. Kelley*, Hun, 387.

⁵*Smith v. Kelley*, 31 Hun, 387; *Turner v. Turner*, 2 Barb. 444; *Reynold Quick*, 128 Ind. 316.

⁶*Holmes v. Bell*, 2 Beav. 298; *Adeen v. Ohitty*, 3 Younge & C. ; *Shakel v. Duke of Marlborough* Madd. 463.

In England all junior mortgages treated as equitable mortgages.

An equitable mortgagee is entitled to a receiver when the mortgagor is in possession, whether the security is scanty or not. A mortgagee on default is entitled to possession without any reference to the value of the property. *Aikins v. Blain*, 13 Grant. C. (Ont.) 646.

⁷*Astor v. Turner*, 11 Paige, 41; *Howell v. Ripley*, 10 Paige, 43; *Lafayette v. Maujer*, 3 Sandf. Ch. 69; *Oakfo v. Robinson*, 48 Ill. App. 270; *Conot v. Grover*, 31 N. J. Eq. 539; *Rider Bagley*, 84 N. Y. 461; *Hayes v. Dickinson*, 9 Hun, 277; *Post v. Dorr*, 4 Edw. Ch. 412; *Johnston v. Riddle*, 70 Ala. 219; *Sturm v. Ermantrout*, 89 Ind. 214. But see *Best v. Schirmier*, 6 N. J. Eq.

§ 177. When appointed.

(a) BEFORE DECREE.

As a general rule application is made for the appointment of a receiver before the entry of a decree of foreclosure, and usually in an interlocutory proceeding after notice, pending the action, the application being based upon the allegations of the bill or petition, alone, or upon such allegations supported by affidavits in addition, or sometimes evidence taken before a master on a reference had for that purpose.

(b) AFTER DECREE.

The appointment, however, is sometimes made after decree of foreclosure, and after a sale thereunder, (1) where the equitable right of the mortgagee to appropriate the rents and profits pending the statutory period allowed for redemption is recognized, and where the right of the mortgagor to such rents during such period is not given to him by statute; (2) where the property is permitted to be sold for taxes;¹ or (3) where the mortgagor is

154; *Cortleyou v. Hathaway*, 11 N. J. Eq. 39; *Frisbie v. Bateman*, 24 N. J. Eq. 28.

The mere default in the payment of the debt is not ground for the appointment of a receiver, but this is not true where there is a stipulation in the mortgage that the mortgagee shall have the rents. *Allen v. Dallas & W. R. Co.* 3 Wood, 816; *Whitehead v. Wooten*, 43 Miss. 523; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. ed. 144.

Until possession is taken of mortgaged property by the receiver the mortgagor is entitled to the profits. *Prayser v. Richmond & A. R. Co.* 81 Va. 388; *Williamson v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 624; *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 608, 23 L. ed. 405; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. ed. 144; *Edwards v. Edwards*, L. R. 2 Ch. Div. 291.

Since, on the dissolution of a cor-

poration, a copartnership of which the corporation was a member is dissolved and the property vests in the surviving partner, the appointment of a receiver of the corporation does not vest him with any of the copartnership property, or give him any right to interfere with the management of the copartnership. *Gray v. Oznard Bros. Co.* 81 N. Y. S. R. 968.

In an action to foreclose a mortgage which affects only the right of the lessee it is not competent for the court to appoint a receiver who shall represent not only his rights but those of the lessor. *Woodward v. Winchill* (Wash.) 44 Pac. 860.

¹*Schreiber v. Carey*, 48 Wis. 208; *Finch v. Houghton*, 19 Wis. 150; *Brinkman v. Ritzinger*, 82 Ind. 358; *Bank of Utica v. Finch*, 8 Barb. Ch. 298; *Syracuse City Bank v. Tallman*, 31 Barb. 201; *Smith v. Tiffany*, 18 Hun, 671; *Astor v. Turner*, 11 Paige, 436; *Hackett v. Snow*, 10 Ir. Eq. Rep.

guilty of fraud or bad faith;¹ or (4) in case of adverse possession;² or (5) where it is necessary to preserve the property;³ or (6) there is danger of loss;⁴ or (7) where the application could not have been made on the hearing.*

220; *Cooke v. Gwyn*, 8 Ark. 690; *Thomas v. Davies*, 11 Beav. 29; *Bowman v. Ball*, 14 Sim. 392; *Wright v. Vernon*, 3 Drew. 112.

It is sufficient ground for the appointment of a receiver *pendente lite* in an action to foreclose a mortgage, that the security is inadequate and the mortgagor is insolvent and has failed to apply the rents of the mortgaged premises to the payment of delinquent taxes and past-due interest on a prior mortgage. *Farmers' Nat. Bank v. Backus* (Minn.) 66 N.W. 5.

Appointment of a receiver of mortgaged property pending a foreclosure suit is authorized, where the value of the property is inadequate, the mortgagors are insolvent, and refuse to deliver possession, and are collecting the rents, applying them to their own use, and have failed to pay the taxes or keep the property insured as they agreed in the mortgage. *Jackson v. Hooper* (Ala.) 18 So. 254.

¹ *Haas v. Chicago Bldg. Soc.* 89 Ill. 498.

² *Thomas v. Davies*, 11 Beav. 20.

³ *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 118, 30 L. ed. 909.

⁴ *Haas v. Chicago Bldg. Soc.* 89 Ill. 498; *Brinkman v. Ritzinger*, 82 Ind. 358; *Connelly v. Dickson*, 76 Ind. 440; *Bidwell v. Paul*, 5 Baxt. 693; *Schreiber v. Carey*, 48 Wis. 208; *Smith v. Tiffany*, 13 Hun. 671.

See *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 118, 30 L. ed. 909.

^{*} *Bainbridge v. Blair*, 4 L. J. Ch. N. S. 207.

An appeal from the final decree does not deprive the lower court of its

power to adjudicate in relation to repairs for the preservation of the property. *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 118, 30 L. ed. 909.

Under the Act of 1879 in Indiana a receiver could not be appointed to take possession and collect the rents of property sold on foreclosure, while the property was in the possession of and occupied by the mortgagor, during the year allowed for redemption. *Sheeks v. Klote*, 84 Ind. 471. But otherwise where the mortgaged property is in the hands of an assignee of the mortgagor. *Davis v. Newcomb*, 72 Ind. 413. Or in the possession of a tenant. *Connelly v. Dickson*, 76 Ind. 440; *Ridgeway v. First Nat. Bank*, 78 Ind. 119.

See also *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510, 581; *Travelers Ins. Co. v. Brouse*, 83 Ind. 62; *Merritt v. Gibson*, 129 Ind. 155, 161, 15 L. R. A. 277.

The appointment of a receiver under stipulation of the parties in a foreclosure action, after judgment, is not prevented by Iowa Code, § 2908, providing only for the appointment of receivers, under certain conditions, in foreclosure actions during the pendency thereof. *Hubbell v. Avenus Invest. Co.* (Iowa) 66 N. W. 85.

A receiver of the rents and profits of mortgaged premises may be appointed pending an appeal from an order confirming a sale on foreclosure where the mortgaged property is probably insufficient to pay the mortgage debt. *Philadelphia Mortg. & T. Co. v. Goos* (Neb.) 66 N. W. 843.

§ 178. General rules applicable.

The rules applicable to the appointment of receivers in general are applicable in all respects to the appointment of receivers in mortgage foreclosures, so far as relates to the proper person to be selected.¹ In foreclosure proceedings the receiver is the representative not only of the mortgagee but of all parties in interest, and if for any reason a mortgagee is appointed, his duties as receiver are paramount to any other personal interests he may have. His claims as an individual must not be permitted to interfere with his duties as receiver, or with the purposes or interests for which he was appointed.² It has been held that a mortgagee appointed receiver is not entitled to commissions.³ In foreclosure proceedings, when a receiver is asked, the application must show who is in possession of the premises. Thus, a tenant in possession will not be disturbed if not a party to the suit.⁴

§ 179. Relative rights of senior and junior mortgagees.

(a) ENGLISH RULE.

Under the early English practice the prior mortgagee was regarded as being vested with the legal title to the premises and entitled to the immediate possession, and was therefore called the legal mortgagee. The holder of a subsequent mortgage was called the equitable mortgagee. Upon default, the legal mortgagee was entitled to take possession of the premises under his mortgage, and appropriate the rents, issues and profits to the satisfaction of his indebtedness. This right resulted in the establishment of the doctrine in the English courts of refusing to interfere with the right of possession of the legal mortgagee, on the application of a junior incumbrancer, by the appointment of a receiver, until the former was fully paid.⁵ And the same rule

¹ § 21.

² *Bolles v. Duff*, 87 How. Pr. 162.

³ *Langstaff v. Fenwick*, 10 Ves. Jr. 405; *Chambers v. Goldwin*, 5 Ves. Jr. 884, note a; *Moore v. Cable*, 1 Johns. Ch. 885; *Breckenridge v. Brooks*, 2 A. K. Marsh. 339.

⁴ *Sea Ins. Co. v. Stebbins*, 8 Paige, 565.

⁵ *Trenton Bkg. Co. v. Woodruff*, 2 Green's Ch. 210; *Quinn v. Brittain*, 8 Edw. Ch. 314; *Berney v. Sewell*, 1 Jac. & W. 647; *United States v. Masich*, 44 Fed. Rep. 10; *Codrington v. Parker*, 16 Ves. Jr. 469; *Hiles v. Moore*, 15 Beav. 175.

applies where the application is by a judgment creditor.¹ If, however, the senior mortgagee does not take possession, or is not in possession of the premises under his mortgage, on the application of a junior mortgagee a receiver may be appointed, but it is without prejudice to the rights of the former.²

(b) AMERICAN RULE.

The general practice in this country is for the mortgagee to foreclose his mortgage and procure a sale of the mortgaged premises, for the purpose of satisfying the indebtedness, and not resort to the possession and appropriation of the rents and profits, so that the question of the relative rights of a senior mortgagee in possession and a junior mortgagee seeking to appropriate the rents through a receivership have seldom arisen as under the English practice. Besides, in some of the states the mortgage is regarded as a security simply for the payment of the mortgage indebtedness, the legal title remaining in the mortgagor, and in other states the right to appropriate the rents and profits is based upon equitable grounds rather than upon legal grounds, based upon the legal title. But as between the holders of senior and junior mortgages, where the right to appropriate the rents and profits after default and prior to the execution of a deed is recognized and enforced through a receivership, the general rule may be stated as follows: (1) The senior mortgagee has a prior right; (2) but if he does not seek to enforce such right, and a receiver is appointed on the application of a junior mortgagee, the latter will be entitled to the rents and profits until such time as a receiver is appointed under the prior mortgage, or until the receivership under the junior mortgage is extended to the prior mortgage. It is an equitable lien secured by diligence.³ If the

¹ *Quinn v. Brittain*, 8 Edw. Ch. 314; *United States v. Masich*, 44 Fed. Rep. 10.

² *Dalmer v. Dashwood*, 2 Cox Ch. 378; *Bryan v. Cormick*, 1 Cox Ch. 422; *Fairfield v. Irvine*, 2 Russ. 149; *Toms v. King*, 64 Md. 166; *Davis v. Duke of Marlborough*, 2 Swanst. 137.

But see under Supreme Judicature Acts of 1873; also *Mason v. Westoby*, L. R. 33 Ch. Div. 206.

³ *Post v. Dorr*, 4 Edw. Ch. 412; *Howell v. Ripley*, 10 Paige, 43; *Rider v. Vrooman*, 12 Hun, 801; *Washington L. Ins. Co. v. Fleischaner*, 10 Hun, 120; *Ranney v. Peyser*, 83 N. Y. 1; *Bank of Ogdensburg v. Arnold*, 5 Paige, 88; *Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 323; *Sales v. Lusk*, 60 Wis. 490.

In *Washington L. Ins. Co. v. Fleischaner*, *supra*, the court say, upon the

prior mortgager is a party to the bill of the junior mortgagee, the latter has no exclusive right to the receivership income.¹

authority of *Post v. Dorr*, *supra*: "It is an established rule that a second or third mortgagee who succeeds in getting a receiver appointed becomes thereby entitled to the rents and profits collected during the appointment, although a prior mortgagee steps in and obtains a receivership in his behalf and fails to obtain enough out of the property to pay his debt. This is on the principle that a mortgagee acquires a specific lien upon the rents, by obtaining the appointment of a receiver of them, and if he be a second or third encumbrancer, the court will give him the benefit of his superior diligence over his senior in respect to the rents which accrued during the time that the elder mortgagee took no measures to have the receivership extended to his suit for his benefit." Cf. *Mittenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Favorite v. Deardorf*, 84 Ind. 558; *Douglass v. Oline*, 12 Bush, 637; *Coddington v. Bispham*, 36 N. J. Eq. 577; *Williamson v. Gerlach*, 41 Ohio St. 684; *Re Snodaker*, 4 Nat. Bankr. Reg. 44; *Thomas v. Brigstocke*, 4 Russ. 64.

And the right of an equitable mortgagee to a receiver of rents and profits is superior to the rights of purchasers of the mortgagor's equity of redemption. *Douglass v. Oline*, 12 Bush, 646; *Lofsky v. Mauwjer*, 3 Sandf. Ch. 69. And also superior to the rights of judgment creditors in possession by sequestration. *Shaw v. Wright*, 3 Ves. Jr. 22; *Walker v. Bell*, 2 Madd. 21.

In Virginia a receiver must account according to the priorities of the different incumbrancers. *Beverley v. Brooke*, 4 Gratt. 187.

¹ A prior incumbrancer has a right

as against a mortgagor and subsequent incumbrancers to the rents and profits accruing subsequent to the appointment. *Leeds v. Gifford*, 41 N. J. Eq. 464.

Though a receiver will not be appointed on the application of the holder of the legal title, on the ground his legal remedy to obtain possession, yet if the legal mortgagee is prevented by the mortgagor from taking possession, a receiver will be appointed. *Truman v. Redgrave*, L. R. 18 Ch. D. 547. The same rule also applies where the trustee in a trust deed refuses to take possession after default in the payment of principal and interest. *Warner v. Rising Fawn Iron Co.* 3 Woods, 514.

On a bill filed by a junior mortgagee against a senior mortgagee and the mortgagor, the senior mortgagee may be compelled to resort in the first instance to other property held by him as security for the mortgage indebtedness, and a receiver be appointed. *Henshaw v. Wells*, 9 Humph. 568.

Mittenberger v. Logansport, C. & S. W. R. Co. 106 U. S. 286, 27 L. ed. 117.

Where the equity of redemption has become vested in a first mortgagee, and a second mortgagee files a bill to redeem, a receiver will be appointed if it appears that the first mortgagee has cut timber of greater value than the amount of his mortgage. *Steinhoff v. Brown*, 11 Grant Ch. (Ont.) 114.

A mortgagee in possession of lands, authorized to pay taxes and apply the excess to the payment of interest and principal, cannot be dispossessed by a receiver in the absence of proof of

Where the application is on behalf of a junior mortgagee and it appears that the senior mortgagee is satisfied with the management and it further appears that the rents are being applied in payment of the mortgage indebtedness, taxes, etc., a receiver will be refused even if the mortgagor is insolvent and the security inadequate.¹

§ 180. Application of parties other than mortgagees.

(a) IN BEHALF OF WIFE.

In foreclosure proceedings where the mortgagor's wife has joined her husband in the execution of a mortgage on his real estate to secure a debt due from him, and her inchoate interest in the mortgaged lands has for some cause become absolute, she is, upon a foreclosure of the mortgage entitled to an order that two thirds of the lands to which she has no claim shall be first exhausted before a resort shall be had to her interest in the mortgaged property upon the theory that she occupies the relation to the mortgage somewhat analogous to that of a surety for her husband, and in such case the wife may procure the appointment of a receiver of the rents and profits in order to protect her interest in the premises.²

(b) IN BEHALF OF ANNUITANTS.

Where annuities are charged upon real estate which has been mortgaged to different mortgagees, the annuitant is entitled to a

waste or an abuse of his right of possession. *Cummings v. Cummings*, 75 Cal. 434.

¹*Mylon v. Davenport*, 51 Iowa, 588. A receiver, in general, is only entitled to the rents uncollected at the time of his appointment, and he is not entitled to the rents collected by an assignee in bankruptcy of mortgagor prior to his appointment. *Rider v. Vrooman*, 12 Hun, 299. Nor is the mortgagor accountable for rents collected prior to the appointment. *Rider v. Bagley*, 84 N. Y. 461.

²*Main v. Ginthart*, 92 Ind. 180. The court say: "The right to have a re-

ceiver appointed in aid of proceedings to foreclose a mortgage does not rest exclusively with the mortgagee, or his assigns, but may be exercised by any other party to the proceeding when necessary to protect his interests in the subject-matter of the litigation." Cf. *Medeker v. Parker*, 70 Ind. 509; *Haggerty v. Byrne*, 75 Ind. 499; *Leary v. Shaffer*, 79 Ind. 567; *Grave v. Bunch*, 88 Ind. 4; *Trentman v. Eldridge*, 98 Ind. 525; *Pouder v. Ritsinger*, 102 Ind. 572; *Cupp v. Campbell*, 103 Ind. 213; *Hoppes v. Hoppes*, 123 Ind. 397; *Purviance v. Emley*, 126 Ind. 419.

receiver of the rents and profits where the prior mortgagees are not in possession.¹

(c) IN BEHALF OF BONDHOLDERS.

Where bonds of a corporation are issued and the property of the company real, and personal, is pledged to secure the same, a receiver may be appointed in behalf of the bondholders, the bonds being in the nature of a mortgage.²

(d) IN BEHALF OF VENDORS.

Where a vendor sells land and gives a title bond and there is a default, tender of a deed and bill filed for a specific performance and it appears that the vendee is insolvent a receiver of the rents and profits *pendente lite* will be appointed.³

¹*Dalmer v. Dashwood*, 2 Cox, Ch. 378.

²*White Water Valley Canal Co. v. Vallette*, 62 U. S. 21 How. 414, 16 L. ed. 154. The court will not appoint a receiver in behalf of a judgment creditor when the mortgagee is in possession and has not been paid. *Quinn v. Brittain*, 8 Edw. Ch. 814; *United States v. Masich*, 44 Fed. Rep. 10; nor in behalf of heirs-at-law of a deceased mortgagor where the mortgagee is in possession. *Faulkenor v. Daniel*, 10 L. J. N. S. Ch. 83.

The paramount lien acquired by a prior chattel mortgage authorizes the appointment of a receiver on a foreclosure thereof to take charge of the mortgaged property, notwithstanding it has been sold pending such foreclosure under an attachment by other creditors of the mortgagor. *Cooper v. Berney Nat. Bank*, 99 Ala. 119; *Dollins v. Lindsey*, 89 Ala. 217.

³The principle that a mortgagee, who files a bill to foreclose, and prays for a receiver of rents *pendente lite*, is entitled to a receiver when the mortgaged property is insufficient to pay the debt, and the mortgagor is insolvent, applies where the vendor of lands by title-bond files his bill for specific performance. *Phillips v. Eiland*, 52 Miss. 731; *Tanner v. Hicks*, 4 Smedes & M. 294.

When a mortgagee is in possession, and is properly managing his trust his possession will not be permitted to be interfered with by a receiver appointed in a creditor's proceeding. *Furlong v. Edwards*, 3 Md. 99. It is only when the mortgagee in possession is guilty of fraud, waste or mismanagement that a receiver will be appointed. *Cummings v. Cummings*, 75 Cal. 434.

CHAPTER XL

RECEIVERSHIP IN PARTNERSHIP MATTERS.

§ 190. Power to appoint.

§ 191. When appointed.

(a) Where partnership agreement or duty is violated.

(b) Where one partner is guilty of fraud.

(c) Where there is serious disagreement between partners.

(d) Where one partner is guilty of mismanagement.

(e) Where there is a violation of dissolution agreement.

(f) Where one partner misappropriates firm property.

(g) Where there is insolvency of limited partnership.

(h) Where plaintiff is entitled to a dissolution.

(i) Where upon dissolution partners cannot agree.

(j) Where partner in charge after dissolution is insolvent.

(k) Where there is an exclusion of one partner from profits.

(l) Where both partners are dead.

(m) Where surviving partner is guilty of mismanagement.

§ 192. When not appointed.

(a) Where there is a mere disagreement between partners.

(b) Where existence of partnership is not established.

(c) Where the only ground is unprofitable business.

(d) Where defendant is responsible and charges not established.

(e) Where plaintiff is in possession and charge.

(f) Where plaintiff's allegations are fully denied.

(g) Where it does not appear that a dissolution will result.

(h) Where a receiver is not necessary.

§ 193. Prerequisites to appointment.

(a) Copartnership must be established, and,

(b) A substantial violation of agreement or duty shown.

§ 194. Who appointed.

§ 195. Appointment in case of retiring partner.

§ 196. In case of assignment by insolvent partner.

§ 197. In case of dissolution by death.

§ 198. On application of creditors.

§ 199. In case of limited partnership.

§ 200. In case of expiration of partnership.

§ 201. In case of exclusion of partner.

§ 202. In case of fraud by one partner.

§ 203. Where one partner is mismanaging business.

§ 204. On ground of insolvency.

§ 205. Where dissolution has taken place.

§ 206. Before dissolution.

§ 207. On miscellaneous grounds.

§ 208. Appointment refused when.

§ 209. Receiver's power and duty.

(a) Power depends on scope of order.

(b) Legal title to property does not vest in him.

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|---|--|
| (c) Cannot loan receivership fund to himself or his firm. | (f) May maintain actions in other states when. |
| (d) Is representative of all parties in interest. | (g) Has no greater power than partners had. |
| (e) Must use ordinary care and reasonable diligence. | § 210. Effect of appointment. |
| | § 211. Receiver as manager. |

§ 190. Power to appoint.

The power of a court of equity, or of a court exercising equity powers, to appoint a receiver in matters of partnership is of long standing and unquestioned, and usually is incidental to the main proceeding. The inability of partners to sue each other at law has always rendered an equity court the proper and, as a rule, the only forum for the adjustment of partnership difficulties, and the winding-up of such concerns in a proper case, and distribution of the partnership assets. Hence the receivership in all such cases is only incidental, and usually the question of jurisdiction and the inadequacy of relief in common law courts is not involved. The question of the necessity of a receiver is, however, involved in every case, for, in this class of actions, as in others, the appointment is not to be made merely because no one will be injured thereby, and, in fact, the necessity has been termed imperative.¹ But this probably is stating the doctrine too strongly, at any rate, the appointment rests in the sound judicial discretion of the court or chancellor, to be exercised or not as the circumstances of each case seem to demand, taking into consideration the preservation of the property, or its proceeds, and the protection of the rights of all parties, as their interests may appear in the final adjudication.²

¹ *Morey v. Grant*, 48 Mich. 326.

² In *Stemmer's Appeal*, 58 Pa. 168, it is said: "A partnership will not be dissolved on slight grounds." "In making such a decree the court will consider not merely the terms of the express contract between the partners but also the duties and obligations implied in every partnership contract. *Smith v. Jeyes*, 4 Beav. 503. Where a valuable business has grown up, by the joint labors and contributions of all, the court should be careful to pre-

serve it, if possible, and put all parties upon a fair and equal footing in competing for it. To appoint a receiver, to direct a sale of the whole and a winding-up of the business would destroy its value without benefiting either party." The Master of Rolls in *Madgwick v. Wimple*, 6 Beav. 495, says: "It must be admitted that when an application is made for a receiver in partnership cases the court is always placed in a position of very great difficulty. On the one hand, if it

§ 191. When appointed.

Stated in general terms a receiver will be appointed in partnership matters :

(a) Where there has been a violation of the partnership agreement, or a breach of partnership duty.¹

(b) Where one of the partners is guilty of fraudulent acts towards his copartner.²

(c) Serious disagreement between partners as to the management or disposition of the firm property.³

(d) Mismanagement on the part of one partner in charge of business.⁴

grants the motion the effect of it is to put an end to the partnership which one of the parties claims a right to have continued; and on the other hand, if it refuses the motion it leaves the defendant at liberty to go on with the partnership business at the risk and probably at the great loss and prejudice of the dissenting party. Between these difficulties it is not very easy to select the course which is best to be taken but the court is under the necessity of adopting some mode of proceeding to protect according to the best view it can take of the matter, the interests of both parties, and it has accordingly interfered in many such cases." In the case of *New v. Wright*, 44 Miss. 202, the court say: "In order to justify the dissolution of a partnership on the ground of misconduct, abuse, or ill-faith of one of the parties it is not sufficient to show that there is a temptation to such misconduct, abuse, or ill-faith but there must be an unequivocal demonstration, by overt acts or gross departures from duty, that the danger is imminent or the injury already accomplished." Citing *Story, Partn. § 288; Williams v. Wilson*, 4 Sandf. Ch. 379; *Harding v. Glover*, 18 Ves. Jr. 281.

¹*New v. Wright*, 44 Miss. 202; *Allen v. Hawley*, 6 Fla. 164; *Heathcot v.*

Ravenacroft, 6 N. J. Eq. 118; *Jackson v. Sheldon*, 9 Abb. Pr. 127; *Const v. Hurris*, Turn. & R. 496; *Harding v. Glover*, 18 Ves. Jr. 281; *Henn v. Walsh*, 2 Edw. Ch. 129; *Crawshaw v. Maule*, 1 Swanst. 507; *Gowan v. Jeffries*, 2 Ashm. 296; *Estwick v. Conningsby*, 1 Vern. 118; *Sutro v. Wagner*, 28 N. J. Eq. 388.

²*Barnes v. Jones*, 91 Ind. 161; *Shannon v. Wright*, 60 Md. 520.

³*Terrell v. Goddard*, 18 Ga. 664; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Marten v. Van Shaick*, 4 Paige, 479; *Law v. Ford*, 2 Paige, 810; *McCracken v. Ware*, 3 Sandf. 688; *Dunham v. Jarvis*, 8 Barb. 88; *Whitman v. Robinson*, 21 Md. 80; *Loomis v. McKenzie*, 31 Iowa, 425; *Roberts v. Eberhardt or Everhardt*, 1 Kay, 148; *Const v. Harris*, Turn. & R. 518; *Speights v. Peters*, 9 Gill, 472; *Williamson v. Wilson*, 1 Bland, Ch. 418; *Walker v. House*, 4 Md. Ch. 39.

⁴*Boyce v. Burchard*, 21 Ga. 74; *Sutro v. Wagner*, 28 N. J. Eq. 388; *Williamson v. Wilson*, 1 Bland, Ch. 418; *Todd v. Rich*, 2 Tenn. Ch. 107; *Jeffreys v. Smith*, 1 Jac. & W. 298; *Bentley v. Bates*, 4 Younge & O. 182; *Hart v. Clarke*, 19 Beav. 349; *Roberts v. Eberhardt or Everhardt*, 1 Kay, 148; *Shepard v. Oxenford*, 1 Kay & J. 491.

- (e) Violation of the terms of a dissolution agreement.¹
- (f) Appropriating firm property to individual use.²
- (g) Insolvency of a limited partnership.³
- (h) Where the plaintiff on a bill for that purpose is entitled to a dissolution.⁴
- (i) Where upon dissolution the firm cannot agree upon an adjustment.⁵
- (j) Insolvency of a partner in charge after dissolution.⁶
- (k) Exclusion of one partner from the profits or the management.⁷

¹ *White v. Colfax*, 1 Jones & S. 297; *Simon v. Schloss*, 48 Mich. 233; *West v. Chasten*, 12 Fla. 315; *Drury v. Roberts*, 2 Md. Ch. 157; *Word v. Word*, 90 Ala. 81; *Berry v. Folkes*, 60 Miss. 576; *Miller v. Jones*, 39 Ill. 54; *Bal-lard v. Callison*, 4 W. Va. 323.

² *Pini v. Roncoroni* [1892] 1 Ch. 638; *Harding v. Glover*, 18 Ves. Jr. 281; *Davis v. Grove*, 2 Robt. 134, 635; *White-sides v. Lafferty*, 8 Humph. 150.

³ *Jackson v. Sheldon*, 9 Abb. Pr. 127; *Lottimer v. Lord*, 4 E. D. Smith, 188.

⁴ *Smith v. Jeyes*, 4 Beav. 508; *Chap-man v. Beach*, 1 Jac. & W. 589; *Gar-retson v. Weaver*, 8 Edw. Ch. 385; *Henn v. Walsh*, 2 Edw. Ch. 129; *Jack-son v. DeForest*, 14 How. Pr. 81; *Will-iamson v. Wilson*, 1 Bland, Ch. 418; *Wolbert v. Harris*, 7 N. J. Eq. 605; *Harding v. Glover*, 18 Ves. Jr. 281; *Marten v. Van Schaick*, 4 Paige, 479; *McElvey v. Lewis*, 76 N. Y. 373. See *Jordan v. Miller*, 75 Va. 442.

⁵ *Van Rensselaer v. Emery*, 9 How. Pr. 135; *McElvey v. Lewis*, 76 N. Y. 373; *Law v. Ford*, 2 Paige, 810; *Mar-tin v. Smith*, 21 Jones & S. 277; *Mar-ten v. Van Schaick*, 4 Paige, 479; *Dunn v. McNaught*, 88 Ga. 179; *Saylor v. Mockbie*, 9 Iowa, 209.

⁶ *Randall v. Morrell*, 17 N. J. Eq. 348.

Failure of surviving partners to close out the partnership business within a year after the death of one of the partners, as provided for in the

articles of copartnership, will not re-quire the appointment of a receiver, where they acted in good faith be-lieving that such action would be prejudicial to all concerned, and agree to close out the business at once upon the commencement of pro-ceedings for an accounting. *Mason v. Dawson*, 15 Misc. 595.

⁷ *Katsch v. Schenck*, 18 L. J. Ch. N. S. 386; *Wolbert v. Harris*, 7 N. J. Eq. 605; *Kirby v. Ingersoll*, 1 Dougl. (Mich.) 477; *Kate v. Brewington*, 71 Md. 79; *Wilson v. Greenwood*, 1 Swanst. 482; *Const v. Harris*, Turn. & R. 496, 525; *Seibert v. Seibert*, 1 Brewst. 531; *Norway v. Rowe*, 19 Ves. Jr. 144; *Milbank v. Revett*, 2 Meriv. 405; *Boyce v. Burchard*, 21 Ga. 74. See *Terrell v. Goddard*, 18 Ga. 664; *Rutter v. Tallis*, 5 Sandf. 610; *William-son v. Wilson*, 1 Bland, Ch. 418; *Hayes v. Heyer*, 3 Sandf. 284; *McCracken v. Ware*, 3 Sandf. 688; *Wetter v. Schlieper*, 4 E. D. Smith, 707; *Speights v. Peters*, 9 Gill, 472; *Harding v. Glover*, 18 Ves. Jr. 281; *Haight v. Burr*, 19 Md. 180; *Gowan v. Jeffries*, 2 Ashm. 296; *Shannon v. Wright*, 60 Md. 520; *Butch-art v. Dresser*, 4 DeG. M. & G. 542; *Barnes v. Jones*, 91 Ind. 116; cf. *Naylor v. Sidener*, 106 Ind. 179; *Blackeney v. Dufaur*, 15 Beav. 40; *Norway v. Rowe*, 19 Ves. Jr. 159; *Peacock v. Peacock*, 16 Ves. Jr. 49.

(l) Where both partners are dead.¹

(m) Where one partner is dead and the survivor is mismanaging.²

§ 192. When not appointed.

A receiver will not be appointed on the application of one partner against his copartner :

(a) Where it appears that there is a mere disagreement between the partners.³

(b) Where it does not clearly appear that the relation between the parties constitutes a partnership.⁴

(c) Where the only ground alleged is the unprofitableness of the business.⁵

(d) Where the defendant is responsible and danger of loss is not alleged and shown.⁶

(e) Where the plaintiff is in possession of the partnership property.⁷

(f) Where the case made by plaintiff's bill or petition is fully denied by defendant's answer.⁸

¹*Philips v. Atkinson*, 2 Bro. C. C. 272; *Wilson v. Greenwood*, 1 Swanst. 480; *Hall v. Hall*, 8 Macn. & G. 79.

²*Walker v. House*, 4 Md. Ch. 89; *Miller v. Jones*, 39 Ill. 54; *Madgwick v. Wimble*, 6 Beav. 495; *Nelson v. Hayner*, 66 Ill. 487; *Gratz v. Bayard*, 11 Serg. & R. 41; *Jacquin v. Buisson*, 11 How. Pr. 385; *Olegg v. Fishwick*, 1 Macn. & G. 264; *Evans v. Evans*, 9 Paige, 178; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Hubbard v. Guild*, 1 Duer, 662; *Law v. Ford*, 2 Paige, 310.

³*Henn v. Walsh*, 2 Edw. Ch. 129; *Law v. Ford*, 2 Paige, 310; *Loomis v. McKenzie*, 31 Iowa, 425; *Marten v. Van Schaick*, 4 Paige, 479; *New v. Wright*, 44 Miss. 202; *Slemmer's Appeal*, 58 Pa. 168.

⁴*Kerr v. Potter*, 6 Gill, 404; *Nutting v. Colt*, 7 N. J. Eq. 539; *Irwin v. Emerson*, 95 Ala. 64; *Peacock v. Peacock*, 16 Ves. Jr. 49; *Hobart v. Ballard*, 31 Iowa, 521; *Goulding v. Bain*, 4

Sandf. 716; *Popper v. Scheider*, 7 Abb. Pr. N. S. 56. See *Katsch v. Schenck*, 18 L. J. Ch. N. S. 886.

⁵*Moies v. O'Neill*, 23 N. J. Eq. 207; *Shoemaker v. Smith*, 74 Ind. 71.

⁶*Kilbreth v. Root*, 83 W. Va. 600; *Loomis v. McKenzie*, 31 Iowa, 425; *Simon v. Schloss*, 48 Mich. 238; *Heflbower v. Buck*, 64 Md. 15; *Wellman v. Harker*, 3 Or. 253; *Quinlivan v. English*, 44 Mo. 46; *Buchanan v. Comstock*, 57 Barb. 568; *Hayes v. Heyer*, 4 Sandf. Ch. 485; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Ex parte Owen*, L. R. 18 Q. B. Div. 113.

⁷*Smith v. Lowe*, 1 Edw. Ch. 83. See *Hoffman v. Duncan*, 17 Jur. 825; *Roberts v. Eberhardt or Everhardt*, 1 Kay, 148; *Buchanan v. Comstock*, 57 Barb. 568.

⁸*Williamson v. Monroe*, 3 Cal. 383; *Rhodes v. Lee*, 32 Ga. 470; *Hottenstein v. Conrad*, 9 Kan. 485; *Coddington v. Tappan*, 26 N. J. Eq. 141; *Parkhurst v.*

(g) Where it does not appear that on final decree the partnership will be dissolved.¹

(h) And where a dissolution is probable but it does not appear that a receiver is necessary to protect the interests.²

§ 193. Prerequisites to appointment.

The appointment of a receiver in matters of partnership is in all cases dependent upon certain facts, the existence of which is necessary to be alleged and shown as preliminary to the relief prayed for, and as preliminary to the jurisdiction of the court in granting such relief.

(a) A partnership must be alleged, or at least, such relationship *inter se* as practically amounts to a partnership, which is usually determined by a participation in the profits of the concern. Such partnership must exist in fact and not merely in name, for an employee though nominally a partner, is not entitled to invoke the aid of the court in the appointment of a receiver, nor is the existence of an agreement between the parties which may ripen into a partnership sufficient.³

Muir, 7 N. J. Eq. 307; *Henn v. Walsh*, 3 Edw. Ch. 129; *Popper v. Scheider*, 7 Abb. Pr. N. S. 56.

¹*Garretson v. Weaver*, 3 Edw. Ch. 885; *Jackson v. De Forest*, 14 How. Pr. 81; *Van Rensselaer v. Emery*, 9 How. Pr. 135; *Bufkin v. Boyce*, 104 Ind. 53; *Whitman v. Robinson*, 21 Md. 30; *Richards v. Baurman*, 65 N. C. 162; *Roberts v. Eberhardt or Everhardt*, 1 Kay, 148; *Hall v. Hall*, 3 Macn. & G. 79; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Chapman v. Beach*, 1 Jac. & W. 594; *Smith v. Jeyes*, 4 Beav. 508.

²*Birdsall v. Colie*, 10 N. J. Eq. 63; *Cox v. Peters*, 13 N. J. Eq. 39. If the defendant offers to secure the plaintiff a receiver is not necessary. *Buchanan v. Comstock*, 57 Barb. 568; cf. *Saverios v. Levy*, 1 N. Y. S. R. 758; *Popper v. Scheider*, 7 Abb. Pr. N. S. 56; *Garretson v. Weaver*, 3 Edw. Ch. 885; *Tomlinson v. Ward*, 2 Conn. 396; *Page v. Vankirk*, 1 Brewst. 290; *Stemmer's Appeal*, 58 Pa. 168.

³In *Kerr v. Potter*, 6 Gill, 404, one of the parties was to have one fourth of the net profits of the business, but under a provision of the contract it was provided that they were not to be partners by reason of the division of the profits; it was held not to be a partnership and there was error in appointing a receiver. And so where a person was employed at a salary of \$500 and one fourth the net profits. *Nutting v. Colt*, 7 N. J. Eq. 539. *Contra*, where the salary was £100 and one fifth of the net profits on all new business. *Katsch v. Schenck*, 18 L. J. Ch. N. S. 386. An agreement of partnership which has not been executed is not sufficient. *Hobart v. Ballard*, 31 Iowa, 521. In the absence of proof of danger the court will not appoint a receiver where the partnership is denied. *Goulding v. Bain*, 4 Sandf. 716; citing *Peacock v. Peacock*, 16 Ves. Jr. 49. And where it is distinctly denied that certain property is partner-

The appointment of a receiver in matters of partnership is also dependent upon certain well-defined principles recognized by courts of chancery, and without the existence of which in all cases the court will refuse to grant the relief prayed for. Many of these principles are universal in their nature and are applicable alike to all classes of receiverships and having already been considered will not in this connection be repeated. It may be stated, however, in general terms as necessary elements in the application for a receiver in all partnership matters:

(b) The existence of a partnership agreement being established, on a bill filed by one partner, it must be shown that there has been a substantial violation of some material portion of the partnership agreement, such as will be sufficient cause for a dissolution of the partnership. It follows that mere disagreements and quarrels between the partners will not warrant the intervention of the court.¹

ship property the court will decline a receivership. *Gregory v. Gregory*, 1 Sweeney, 618. In *King v. Barnes*, 51 Hun, 550, the action was brought to establish and enforce the rights of the parties who had advanced money and incurred liabilities in reliance upon the agreement for a joint enterprise, and it was held that the case was peculiarly within the jurisdiction of a court of equity and that a receiver was necessary to final and complete relief. See same case on joint relationship of the parties in 109 N. Y. 267. In *Lau v. Garrett*, L. R. 8 Ch. Div. 26, the court refused a receiver on the application of one partner on the ground that the partners by an agreement had referred all matters in dispute to a foreign court, and although the court had a right to appoint pending an arbitration it would not do so unless a special case was made, on the ground that it would interfere with the court of arbitration. Cf. *Semple v. Flynn* (N. J.) 8 Cent. Rep. 549. As to partnership as between the parties see *Waugh v. Carter*, 2 H. Bl. 235, 246.

A receiver will not be appointed nor an injunction granted in proceedings to dissolve an alleged partnership where the partnership is denied, unless it clearly appears that a partnership exists or that the fund is in danger. *McCarty v. Stanwois*, 16 Misc. 182.

¹*Speights v. Peters*, 9 Gill, 472. In this case the court held in an action between two parties that as against the legal title, or a strong presumptive title in the defendant the court would interfere with great reluctance, and only where the property was in danger of being materially injured or lost. In *Whitman v. Robinson*, 21 Md. 30, the evidence showed "a serious and irreconcilable disagreement between the parties both as to the control and disposition of the property and effects," a receiver was appointed. In *Sloan v. Moore*, 87 Pa. 217, the court say: "Indeed it is difficult to see how the necessity of a receiver can be avoided on the dissolution of a partnership when the parties cannot agree as to the disposition of the joint effects for no one has a right to their

§ 194. Who appointed.

The general principles in regard to the proper person to be selected as receiver have elsewhere been considered, and as a rule are applicable to receiverships in partnership matters. And while it is not the usual practice, or a very common practice, to appoint one of the partners receiver, yet it is sometimes done where the circumstances indicate that such a course would be productive of the best interests of all parties concerned. This course is especially beneficial where the partnership property consists largely of the good will, and the protection of the good will depends upon the continuation, for the time being, of the business by a person thoroughly acquainted with the nature of the business, and

possession and control superior to that of the other." Cf. *Walker v. House*, 4 Md. Ch. 48; *Speights v. Peters*, *supra*. In *Allen v. Hawley*, 6 Fla. 142, 164, the court say: "From the examination which we have made of the authorities on this subject we think the law may be considered as settled that whenever the intervention of a court of equity becomes necessary, in consequence of dissensions or disagreements between the partners, to effect a settlement and closing up the partnership concerns, upon a bill filed by any of the partners showing either a breach of duty on the part of the other partners or a violation of the agreement of partnership a receiver will be appointed as a matter of course." Where the petition showed a probable right to the property in the plaintiff, or a portion thereof and that there was danger of being lost or materially injured or impaired, the appointment is proper. *Saylor v. Mockbie*, 9 Iowa, 209. In *Stemmer's Appeal*, 58 Pa. 168, it was held that if it appeared that the partnership could no longer be carried on with comfort and advantage a receiver would be appointed. Cf. *Jordan v. Miller*, 75 Va. 442; *Gridley v. Conner*, 3 La. Ann. 87.

In *American Loan & T. Co. v. Toledo, O. & S. R. Co.* 29 Fed. Rep. 416, which was a foreclosure case on the subject of disagreements the court says: "All this character of allegations in the bill amount to protests against the management of the company under its present control, and are such as a critical business judgment might make against the management of almost any railroad enterprise a mere conflict of opinions as to business operations. In *Hale v. Hale*, 4 Beav. 369, it was held that a dormant partner was entitled to a receiver as against the managing partners. Where there is such a difference between the parties that each files a bill in equity for relief and the business consists principally of good will, the court will order an immediate sale of the property and good will, and restrain the parties from conducting the same business directly or indirectly in the city where the partnership had been carried on. *Williams v. Wilson*, 4 Sandf. Ch. 405. Cf. *Pratt v. Underwood*, 4 N. Y. Civ. Proc. 167, as to continuation of the business by one partner, and also as to the character of disagreement which will authorize the appointment.

in many cases no one can be selected who is so competent for this as one of the partners, particularly if he be one through whose instrumentality and business judgment the business has been established. An element to be considered in the discretion to be exercised in this connection is the interest of the respective parties. Thus if the defendant in possession has a much larger interest in the profits of the business and has been the manager thereof and the plaintiff has comparatively a small proportion of the net profits and has not been in the active management it would seem to be peculiarly a case where the defendant should be continued in charge as receiver, and particularly so in the absence of mismanagement or insolvency. Of course where one of the partners is appointed receiver he becomes an officer of court, and conducts the business and closes it up, in all respects as other receivers, and his duties and liabilities are governed in all respects by the same rules, except in the matter of compensation, the court usually requiring such receiver to act without compensation.'

'As to the appointment of one of the parties as receiver the court in *Blakeney v. Dufaur*, 15 Beav. 40, says: "It is probable that if the master should appoint either of the partners he will select the one who is at present in possession of the assets; but he would then be in possession of the assets in a totally different character from that in which he is at present. He would then be the officer of the court, having given due security to account for the moneys he shall receive; but in such case it is without salary. In *Brien v. Harriman*, 1 Tenn. Ch. 467, it was held to be unusual to appoint one of the partners receiver, but if it was done it must be without salary." Citing *Wilson v. Greenwood*, 1 Swanst. 481. Where a partner is appointed receiver and carries on the business under the direction of the court and large profits accrue therefrom, all the parties are permitted to participate in such profits. *McMahon v. McClernan*, 10 W. Va. 419, 467; but see *Durbin v. Barber*, 14

Ohio, 311; *Whitesides v. Lafferty*, 8 Humph. 150; *Taylor v. Hutchison*, 35 Gratt. 536. In *Beverley v. Brooke* and *Beverley v. Scott*, 4 Gratt. 212, it is said: "During such controversy the rents are accruing in the custody of the court ready to be paid over to the party ultimately prevailing. In truth from the time of the order of appointment both parties are in possession by the hand of the receiver and when the question of right is ultimately decided the possession of the party prevailing becomes exclusive throughout the whole period by relation to the date of the order. This is clear both upon principle and authority. In such case there can be no rule of diligence for the exclusive appropriation of the rents." As to the propriety of appointing one of the partners receiver and manager the master of rolls in *Sargant v. Read*, L. R. 1 Ch. Div. 600, 608, says: "It seems the plaintiffs are entitled on the undisputed figures to rather more than three fourths of the capital; they are entitled either to

The appointment of one of the partners as receiver is frequently made by agreement of the parties in interest, as in so doing he is under the control and direction of the court, so that no interest can be prejudiced and the bond given is a protection as to the proceeds.¹

§ 195. Appointment in case of retiring partner.

The court is frequently called upon to appoint a receiver in the interest of a retiring partner where the terms of the dissolution agreement are being violated. Thus where a partnership has been dissolved by mutual agreement and by the terms of dissolution the remaining partners continuing the business assume and agree to pay the outstanding firm liabilities and there is a violation of the agreement in this regard, the court may properly appoint a receiver, at least of so much of the firm assets as will be sufficient to discharge the remaining firm indebtedness.² This is based

three fourths or four fifths of the profit; and they are the original owners of the business who have been carrying it on without any substantial interference on the part of the defendant for upwards of a year. It appears that the defendant was unable through ill health to attend to business, but that does not at all affect the fact that they are the persons who carried it on. * * * On the other hand if I deprive the plaintiff of the opportunity of being receiver I might inflict most serious injury on the business." Cf. *Collins v. Barker* [1893] 1 Ch. 578; *Reynolds v. Austin*, 4 Del. Ch. 24.

¹*Conner v. Bolden*, 8 Daly, 257; *Whitesides v. Lafferty*, 8 Humph. 150; *Todd v. Rich*, 2 Tenn. Ch. 107.

²*West v. Chasten*, 12 Fla. 315. The court held that so long as the effects are impressed with the character of partnership property a dissolution cannot destroy the rights each partner has to a general accounting, the payment of the partnership debts, and a division of the surplus, according to

their respective interests. The dissolution destroyed the relation of partnership, but with it a new relation was created, to wit, the obligation of the remaining partner to pay the debts of the firm from the firm assets transferred to him for that purpose. In *Drury v. Roberts*, 2 Md. Ch. 157, where the right to the collection of the firm assets and the winding-up of the firm business was delegated to one partner, it was held that there must be an abuse of this delegated power shown, or danger in order to justify the court in appointing a receiver. If he is wasting or misapplying the property, or if there is danger of insolvency, or fraud, the court will intercede. If, however, all these allegations are denied by answer the necessity is removed. If the parties on dissolution have agreed upon the method of collection of the accounts and the defendants are responsible no sufficient ground is shown for a receiver. *Simon v. Schloss*, 48 Mich. 233; *Arnold v. Bright*, 41 Mich. 210. In *Hayes v. Hoyer*, 4 Sandf. Ch. 485, a bill was

upon the doctrine of principal and suretyship or perhaps more properly upon the relation of trusteeship. By the terms of the dissolution the retiring partner transfers to the remaining partner the legal title to the partnership assets and the latter in consideration of such transfer undertakes to discharge the firm liabilities. He thus holds the property of the late firm charged with a specific purpose and the courts jealously protect the interests of the retiring partner therein. There may also be a violation of the terms of the dissolution agreement in other important particulars which will be ample cause for the intervention of the

filed by one partner against another partner and his assignee seeking to set aside an alleged fraudulent assignment made by the latter for the benefit of creditors, without preference, and on motion for a receiver the court refused to appoint, declining to decide, however, as to the right of one partner to make a valid assignment, no insolvency appearing. (See note to this case as to the power of one partner to make an assignment without the consent of the other.) Where partners cannot agree as to the mode of liquidation, the court will appoint a receiver; and if on the dissolution the partners make an agreement as to the mode of winding up the affairs and select one of their number to collect the assets, and pay the debts and distribute the remainder, a court of equity will not interfere and appoint a receiver, unless the parties prove recreant to the trust imposed upon them by the dissolution agreement. The retiring partners have a right to receive all information respecting collections made, and access to the books, and where, by reason of bitter enmity between the parties, this information and access cannot reasonably be expected, and money that should be applied on firm indebtedness is diverted or not used for that purpose a receiver will be appointed. *White v. Colfax*, 1 Jones & S. 207.

In *Allyn v. Boorman*, 30 Wis. 684, the retiring partner is held to occupy the relation of surety and entitled to the rights of a surety. In *Law v. Ford*, 2 Paige, 810, it was held that where either partner has a right to dissolve the partnership, and there is no provision as to a settlement the appointment of a receiver is a matter of course, and the court will direct the receiver to apply the assets ratably and without preference. To the same effect is *Marten v. Van Schaick*, 4 Paige, 479. On a creditor's bill against a dissolved firm where one has assumed the indebtedness, it was held that a receiver should be appointed over the separate property of the remaining partner and the partnership property but not over the separate property of the retiring partner. *Henry v. Henry*, 10 Paige, 814. In the absence of danger the court will not appoint a new receiver in lieu of coreceivers previously appointed by consent of all parties, where the only cause of disagreement was their incompatibility of temper and personal quarrels. *Conner v. Belden*, 8 Daly, 257. Cf. *Harding v. Glover*, 18 Ves. Jr. 281; *Peacock v. Peacock*, 16 Ves. Jr. 49; *Wilson v. Greenwood*, 1 Swanst. 471; *Butchart v. Dresser*, 4 DeG. M. & G. 542.

court and the appointment of a receiver.' But in this class of receiverships, as in others, the element of danger is in all cases a necessary element in the absence of which the court will refuse to act.'

§ 196. In case of assignment by insolvent partner.

The appropriation of the firm assets by an insolvent member of the firm by means of an assignment for the benefit of creditors will not be permitted by the court, and on application of the solvent members against such insolvent member thus seeking to dispose of the firm property and his assignee, the assignment may be set aside and an injunction granted and receiver appointed.*

* *White v. Colfax*, 1 Jones & S. 297; also preceding note.

* *Simon v. Schloss*, 48 Mich. 283; *West v. Ohastan*, 12 Fla. 315; *Drury v. Roberts*, 2 Md. Ch. 157.

* *Davis v. Grove*, 2 Robt. 184, 635. In this case one firm entered into an agreement with another firm to do business on joint account in the purchase and sale of sugar. One of the firms made a general assignment for the benefit of creditors, without preference. The other firm filed a bill against the insolvent firm and its assigns; it was held that the relation of the two firms was that of partners, on the authority of *Cumpston v. McNair*, 1 Wend. 457; *Reynolds v. Cleveland*, 4 Cow. 282; *Mumford v. Nicoll*, 20 Johns. 611; and *Smith v. Wright*, 1 Abb. Pr. 243; that the interest of each partner in the assets and stock of the partnership was subject to the lien of the other partners for payment beyond their share of the debts of the company, and was applicable to the payment of debts not paid, before any division of the partnership property (*Addison v. Burckmyer*, 4 Sandf. Ch. 488; *Kirby v. Schoonmaker*, 8 Barb. Ch. 46; *Geortner v. Canajoharie*, 2 Barb. 625); that the assignment of one firm only carried that residuary interest, as it

was general of the real and personal estate of the assignors; that the attempt of the assigning firm to appropriate the partnership assets entitled the other firm to a receiver. *Harding v. Glover*, 18 Ves. Jr. 281; *Roberts v. Eberhardt*, 23 Eng. L. & Eq. 245; *Wilson v. Greenwood*, 1 Swanst. 471, 480; *Const v. Harris*, Turn. & R. 496; *Hubbard v. Guild*, 1 Duer, 662. In *Seibert v. Seibert*, 1 Brewst. 531, one partner sold his interest to another member and it was held that the sale was a dissolution of the firm, and that the vendee bought nothing but the right to account, but even in such case the remaining partner had no right to exclude the selling partner or his assignee and set up an adverse interest. The court say: "He (the remaining partner) cannot be permitted to close the door in the face of one who holds the undisputed assignment of a partner's share, and say to his *cestui que trust* I hold, use, and trade with all the property as my own." Cf. *Hayes v. Hoyer*, 4 Sandf. Ch. 485; *Rutler v. Tallie*, 5 Sandf. 610.

The court in *Kirby v. Ingersoll*, 1 Dougl. (Mich.) 477, lays down the following general rule: The power of dissolving the firm and at the same

But when a firm has been dissolved by agreement and one partner agrees to close up the business and pay the firm liabilities, and makes an assignment for the benefit of creditors equally and without preference, such assignment will be upheld in the absence of any showing of danger of loss through the assignee by reason of insolvency.¹

§ 197. In case of dissolution by death.

The death of a partner, as a rule, dissolves the partnership but the surviving partner or partners are required to wind up the partnership business and for the purpose of doing so are entitled to remain in possession of the business and the partnership assets for a reasonable time, in the absence of a statute, to close up the

time excluding the other partners from all participation in the administering of the property by the appointment of a trustee for preferred creditors cannot be presumed among the powers granted by partners to each other. Power beyond this may be given in particular instances, or may be inferred from the conduct and course of business of the partners. The circumstances in which one partner is placed may sometimes give him power to do what otherwise the law would not imply. The circumstances must in such case be such as to authorize the presumption that such power was conferred by the other partners, as where one partner is abroad and has confided the management of the business to the home partner. Cf. *Anderson v. Tompkins*, 1 Brock. 456.

¹ In *Renton v. Chaplain*, 9 N. J. Eq. 62, it was held that when one partner's interest is levied on and sold it works a dissolution of the firm but the court will not appoint a receiver except in case of gross misconduct of the remaining partner. *Heathcot v. Ravenscroft*, 6 N. J. Eq. 118. In *Kirby v. Ingersoll*, 1 Dougl. (Mich.) 477, it was held that the implied authority arising from the ordinary con-

tract of partnership does not authorize one partner without the assent of the other partners to make a general assignment of the partnership effects to trustees for the benefit of creditors, giving preference to some creditors over others; and where it appears that such assignment was made without any pressing necessity therefor, and with a view of dissolving the partnership and thereby depriving other partners of the power in the management and disposition of the partnership property it was fraudulent and void. The general rule is that one partner has no right to make an assignment of the partnership effects without the consent of the other partner. *Dickinson v. Legare*, 1 Desaus. Eq. 587. But this rule probably has an exception where one partner is abroad and has confided the management to the resident partner. *Harrison v. Sterry*, 9 U. S. 5 Cranch, 289, 3 L. ed. 104; Cf. *Egberts v. Wood*, 3 Paige, 517; the authority in such case would probably be implied, but no authority by implication can arise by the simple partnership relationship. *Hatens v. Hussey*, 5 Paige, 80; *Hitchcock v. St. John*, 1 Hoffm. Ch. 511.

business and account to the representatives of the deceased partner for his interest in the concern. During the winding-up of the partnership business by the surviving partner or partners the court is frequently called upon to protect the interest of the deceased partner against mismanagement or fraud or great danger of loss, which is usually accomplished by the appointment of a receiver.¹

¹ In *Connor v. Allen*, Harr. Ch. (Mich.) 871, it is held that a surviving partner has a legal right to the possession of the partnership property and the court will not deprive him of that right except upon proof of mismanagement or danger to the partnership effects. Cf. *Walker v. House*, 4 Md. Ch. 39; *Philips v. Atkinson*, 2 Bro. C. C. 272; *Jacquin v. Buisson*, 11 How. Pr. 885; *Davis v. Ames*, 8 Drew. 64; *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539; *Murray v. Mumford*, 6 Cow. 441; *Case v. Abeel*, 1 Paige, 393.

If both partners are dead the court will, as a matter of course, appoint a receiver. Where both are living and either has a right to dissolve the partnership, and the partnership agreement makes no provision for closing up the business a receiver will be appointed, as of course, if the partners cannot agree between themselves. *Walker v. House*, *supra*; *Law v. Ford*, 2 Paige, 810; *Evans v. Evans*, 9 Paige, 178.

If the survivor does not, within a reasonable time, account with the executor, and come to a settlement, equity will interfere, in order to prevent loss, and appoint a receiver. *Harts v. Schrader*, 8 Ves. Jr. 317.

If both partners are living it must appear that in the end, or on the final hearing there will be a dissolution of the copartnership. *Waters v. Taylor*, 15 Ves. Jr. 10; *Peacock v. Peacock*, 16 Ves. Jr. 57.

The court will not interfere in case

of an existing partnership except for mismanagement or violation of the partnership agreement, and where one partner dies the surviving partner has a right to remain in possession, and close up the partnership business, and in such case the court will not interfere by the appointment of a receiver in the absence of unfaithfulness or insolvency. Where by agreement the capital in the business is to remain for a given length of time, the acting partner has a right to use such capital and can only be interfered with on such ground as would justify a dissolution of the partnership before the time limited therefor. *Jacquin v. Buisson*, 11 How. Pr. 885. Where a partnership has terminated by agreement and it is part of the terms of dissolution that a third person should collect the outstanding assets, and afterwards one of the partners dies, it is held that the survivor could not repudiate the agreement and if he does so the legal representative of the deceased partner has a right to a receiver. *Davis v. Ames*, 8 Drew. 64. The appointment of an executor to administer on the estate of a deceased partner is no ground for refusing a receiver. *Helms v. Littlejohn*, 12 La. Ann. 298.

The administratrix has an interest in a renewed lease made after the death of her intestate, made by the surviving partners. *Clegg v. Fishwick*, 1 Macn. & G. 294. In *Madgwick v. Wimble*, 6 Beav. 495, it was held that

§ 198. On application of creditors.

In matters of partnership the court will sometimes appoint a receiver in an action brought by the general creditors of the firm in behalf of themselves and the other creditors, the purpose in such case being primarily the appointment of a receiver and ultimately the ratable distribution of the assets of the firm. But in this class of cases there must be mismanagement or insolvency and threatened loss.¹

where by partnership stipulation a son of one partner, or, in case of his minority, the executor, should on the death of such partner succeed to his share in the partnership business, the court considered it an option in favor of such son or executor and not an obligation. Where the defendant in an action for dissolution set up a claim to the whole of the partnership property for himself, it was held that it was unnecessary to allege or show misconduct or mismanagement on his part.

In *Geortner v. Canajoharie*, 2 Barb. 625, it appeared that after the death of one partner the remaining insolvent partner sold a part of the partnership stock to pay his individual debts and the purchaser had knowledge of the insolvency and of his object of making the sale, it was held that the sale was void and that each partner had a right to have the funds applied directly to the discharge of the partnership debts and that if the funds were not so applied a receiver would be appointed. Where a receiver is appointed after the death of one partner such receiver succeeds to the rights of the surviving partner. *Kirkpatrick v. McElroy*, 41 N. J. Eq. 589.

In all cases it is held, except where the partnership agreement otherwise provides, that the death of one partner operates instantaneously as a dissolution of the partnership. *Ex parte Williams*,

11 Ves. Jr. 5; *Vulliamy v. Noble*, 3 Meriv. 614.

After the death of one partner a receiver will be appointed only in case of a breach of duty or in a breach of contract; and where a surviving partner is carrying on the business on his own account with the partnership effects, a receiver will be appointed. *Harding v. Glover*, 18 Ves. Jr. 281.

¹In *Fechheimer v. Baum*, 37 Fed. Rep. 167, 2 L. R. A. 153, the court says: "It is now settled that the courts of the United States may administer an equitable right granted by the law of the state in suits of which, from other reasons, they have jurisdiction. It was urged that creditors without judgment had no right to apply, in equity, for the appointment of a receiver. That this is the general rule is undeniable, but there are exceptions to it, and one of these exceptions, of apparently clear distinctness, is where the lawmaking power has enacted, in terms, that the debt need only be matured, with payment demanded and with a refusal, as is the law in Georgia. It is true also—as is held in this circuit in *Jaffrey v. Brown*, 29 Fed. Rep. 477—that a party not intending to pay, by inducing one to sell him goods on credit, through the fraudulent concealment of his insolvency, and of his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent third

§ 199. In case of limited partnerships.

There are a few cases holding that in the matter of limited partnerships, where the firm has become insolvent and a bill is filed in behalf of all creditors of the firm a receiver may be ap-

party has acquired an interest in them, to disaffirm the contract and recover the goods." *Orittenden v. Coleman*, 70 Ga. 295; *Donaldson v. Farnell*, 93 U. S. 633, 23 L. ed. 994. Upon the question of the right of a seller to disaffirm the sale and retake the property sold by him, upon the ground of fraud and misrepresentation, see note to *Jaffrey v. Brown*, 29 Fed. Rep. 485. In *La Chaise v. Lord*, 1 Abb. Pr. 218, it was held that the court would not appoint a receiver where the application was in behalf of one firm, out of a large number of creditors of an insolvent firm. Suit must be brought by all the creditors of the insolvent firm who will unite therein and all the defendants sought to be made liable, as partners, should admit the indebtedness or, in other words, where a receiver is asked without judgment the indebtedness must be admitted. See also *Hardt v. Levy*, 72 Hun, 225, which was an action by the general creditors and all others who might come in for the purpose of procuring a receiver. In this case it was held that such an action (without judgment) could not be maintained against a general partnership but that it might be maintained against a limited partnership. Cf. *Innes v. Lansing*, 7 Paige, 588; *Van Alstyne v. Cook*, 25 N. Y. 489.

The cases of *Burgwyn Bros. Tobacco Co. v. Bentley*, 90 Ga. 508, and *Oliver v. Victor*, 74 Ga. 548, were actions brought by general creditors. In the latter case suit was brought to set aside a voluntary assignment in which a receiver was appointed. In *Henry v. Henry*, 10 Paige, 814, it was held that

a creditor was not entitled to a receiver of the separate property of one of the partners who had sold his interest to his copartner, the latter assuming the payment of all indebtedness: that the receivership should be against the firm property and the separate property of the remaining partner unless some valid excuse should be given for not doing so.

In *Greenwood v. Brodhead*, 8 Barb. 598, it was held that creditors at large must have a judgment and a lien either legal or equitable and to be in a position to assert such lien. In *Venable v. Smith*, 98 N. C. 523, it was held that before a receiver would be appointed it must be manifest that there is mismanagement of the property and that it is in danger of being lost or that it is in possession of an insolvent or unfit trustee. Cf. *Dick v. Laird*, 4 Cranch, C. C. 667.

A simple partnership creditor of a copartnership has no such lien on the partnership assets as entitles him to the appointment of a receiver to settle up the partnership estate upon its insolvency. *Waples-Platter Co. v. Mitchell* (Tex. Civ. App.) 85 S. W. 200.

A decree permanently appointing a receiver of the assets of an insolvent firm, on the ground that a trustee for the payment of the claims of creditors is violating his duty in failing to keep such assets separate from his individual funds and in some place of safe keeping, is appealable as adjudging the principles of the case, although the possession and administration of personal property alone is involved. *Wagner v. Coen* (W. Va.) 28 S. E. 785.

pointed. The action is based upon the doctrine that upon the insolvency of the firm the assets become a trust fund to be divided equally between all creditors, and that in such case it becomes the duty of the general partners to place the firm property in the hands of a trustee for such distribution, and in default of doing so court will appoint a receiver for such purpose. The underlying principle upon which these cases rest is that of securing an equal distribution among all general creditors, and the inequitable principle of preferences sometimes recognized. The principle of placing the effects of a limited partnership in the position of trust funds, and applying to the general partners the relationship of trustees has its analogy in the rules applied to private corporations in cases of insolvency, and is founded upon justice and fair dealing but, strange as it may seem, has been established in but one of the United States.¹

¹ In *Mills v. Argall*, 6 Paige, 577, it was held that the assignment by a limited partnership to a trustee for the benefit of creditors after the firm had become insolvent, or was in contemplation of insolvency, was void as against the creditors of the firm if preferences were made to one creditor, or class of creditors; and also if the assignment provides for the payment of a debt of the special partner ratably with other creditors of the firm. This case was based upon the provisions of the statutes regarding limited partnership and prohibiting preferences. In *Innes v. Lansing*, 7 Paige, 583, it was held that in a case of limited partnership the effects of the firm, upon its becoming insolvent, become a special trust fund for the payment of the partnership debts ratably except debts due special partners, and that the filing of a bill by one creditor in behalf of himself and of others is a bar to the filing of another similar bill. In *Jackson v. Sheldon*, 9 Abb. Pr. 127, the same doctrine was held as in the case last cited, and that where the firm becomes in-

solvent it is the duty of the partners to place in the hands of a trustee the partnership effects for the benefit of all creditors without preference. It was also held that where certain creditors obtained judgment upon a failure of the parties to answer and levied executions upon the partnership effects, after which the partners made a general assignment for the benefit of creditors without preference, that the court should enjoin the levy and sale on the execution and appoint a receiver to take charge of the effects as they existed at the time of the insolvency. The decision is based upon the ground that the failure of the parties to answer and thereby suffering a default of the firm was in effect giving a preference to the judgment creditors. The motion to set aside the sale in such case for irregularity must be made in the action in which the sale was had, but the order on the sheriff to retain the property unsold is properly made in the creditor's suit. Cf. *Whitewright v. Stimpson*, 2 Barb. 379.

In *Hayes v. Heyer*, 8 Sandf. Ch. 293, the court say in relation to gen-

§ 200. In case of expiration of partnership.

Where a partnership has been formed for a definite period and this period has expired by its terms a receiver is not usually appointed except where mismanagement, improper conduct, or other dereliction in duty is shown.¹

§ 201. In case of exclusion of partner.

Courts have frequently been called upon to appoint a receiver in matters of partnership where one or more partners have been excluded from participating in the management of the firm business, or otherwise denied recognition, in violation of the copartnership agreement, or the implied relationship between the members of the firm. This exclusion may be from a participation in the business, or from access to the firm books, and may take place

eral and limited copartnerships that the rule is the same in both cases regarding the distribution made by the court but when the order of distribution is made by the partners themselves in ordinary copartnerships they may give preference to one creditor or a class of creditors over others, while in limited partnerships the statute reserves that power and directs the mode of distribution. It was also held that a single member of a failing firm cannot appoint a trustee without the consent or knowledge of the other partners and thus transfer to such trustee the entire partnership effects. See also *Deming v. Colt*, 8 Sandf. Ch. 284. In *Hogg v. Ellis*, 8 How. Pr. 473, an accounting was allowed between general and special partners as in other cases, and this either after or before dissolution. Cf. *Lottimer v. Lord*, 4 E. D. Smith, 183.

In *Van Alstyne v. Cook*, 25 N. Y. 489, it is held that the members of a limited partnership before or after insolvency are just as liable to suit for their debts as other natural persons. Their creditors are entitled to recover judgment against them with a view of

reaching the individual property as well as partnership property. The property of a limited partnership does not constitute a trust fund in the hands of partners any more than in ordinary partnerships. No rule of equity exists which makes them trust funds in any other sense or which gives a court of equity any control over them, or which forbids creditors of the copartnership, or an individual from obtaining a lien on them by due process of law.

¹In *Bufkin v. Boyce*, 104 Ind. 53, where a partnership had expired by limitation and neither partner desired to continue the business it was held that a receiver would not be appointed on the application of one to settle the partnership affairs in the absence of any showing of mismanagement or improper conduct on the part of the person against whom the relief is sought. Cf. *Shoemaker v. Smith*, 74 Ind. 71; *Morey v. Grant*, 48 Mich. 326; *Baker v. Backus*, 32 Ill. 79; *Willis v. Corties*, 2 Edw. Ch. 281; *Jones v. Schaal*, 45 Mich. 379; *Cook v. Detroit & M. R. Co.* 45 Mich. 453.

during the existence of the partnership, or after its dissolution, and may apply under some circumstances to the legal representatives of a deceased partner.¹

¹In *Wilson v. Greenwood*, 1 Swanst. 471 (481), it was held that in the ordinary course of trade if one partner excludes another from taking that part in the concern which he is entitled to it is ground for the appointment of a receiver; so also if in the course of winding up the affairs after the determination of the partnership, the court, if necessary, interposes on the same principle.

In *Kirby v. Ingersoll*, 1 Dougl. (Mich.) 477, it was held that one partner had no right, without the consent of his copartners, to make an assignment and thus exclude the others where it appeared that the assignment was not of a pressing necessity.

In *Const v. Harris*, 1 Turn. & R. 496 (525), it was held that the circumstance of one partner having taken upon himself the power to exclude another from his full share in the management of the business, authorizes the court to appoint a receiver.

In *Gowan v. Jeffries*, 2 Ashm. 296, it was held to be an exclusion where just and fair books were not kept and where one partner refused to furnish accounts demanded.

In *Blakeney v. Dufaur*, 15 Beav. 40, it is said that exclusion will not be permitted except in cases where the parties themselves have provided by agreement for exclusion upon the happening of certain events. Cf. *Terrell v. Goddard*, 18 Ga. 664; *Wolbert v. Harris*, 7 N. J. Eq. 605; *Milbank v. Revett*, 2 Meriv. 405.

In *Goodman v. Whitcomb*, 1 Jac. & W. 589, where money was received and not entered in the books and the books were not held open to inspection, it

was held to be a violation of the duties of partners to each other.

In *Clegg v. Fishwick*, 1 Macn. & G. 294 (298), where partners were jointly interested with others in a lease which was subsequently renewed in the name of some of the partners without the consent of the others, it was held to be an exclusion. And see *Leach v. Leach*, 18 Pick. 68; *Clements v. Hall*, 2 DeG. & J. 178; *Clegg v. Edmondson*, 8 De G. M. & G. 787.

In *Speights v. Peters*, 9 Gill, 472, it was held that if one partner in the ordinary course of trade seeks to exclude another from taking that part in the concern which he is entitled to take, a receiver should be appointed on the authority of Lord Eldon in *Wilson v. Greenwood*, 1 Swanst. 481.

In *Kershaw v. Matthews*, 2 Russ. 62, where by the article of agreement it was stipulated that upon the death of one partner such deceased partner should be succeeded in business by some other person, or by his executor, and such person refused to act it was held that the death of one partner put an end to the partnership but that in such case it was not an exclusion for the reason that the latter had never been a partner.

In *Bilton v. Blakely*, 6 Grant Ch. (Ont.) 575, it was held that the representatives of a deceased partner had a right to inspect the books of the partnership and to be informed of the proceedings of the survivor, and, on refusal by the latter, were entitled to a receiver. Cf. *Steele v. Grossmith*, 19 Grant, Ch. (Ont.) 141; *Wilcox v. Pratt*, 52 Hun, 840.

In *Katz v. Brevington*, 71 Md. 79.

§ 202. In case of fraud by one partner.

The fraudulent acts of a partner as to his copartner, such as a misappropriation of the firm property or funds, false entries upon the firm books, or depriving him of access to such books, concealing from him the true condition of the business, afford ground for the appointment of a receiver.¹ And the same rules apply

the allegation was that the defendant had excluded the plaintiff from all control over the business, and had refused to give information regarding it, and carried away the books from the place of business, and refused to disclose the place in which they were kept. The court say: "Each partner has an equal right to take management of the business although one of them may have only an interest in the profits and not the capital, yet his rights are involved in the proper conduct of the affairs of the firm so the profits may be made. So each partner has an equal right to information about the partnership affairs and free access to the books. The complainant has a right to learn from the books whether there were profits and whether there were debts."

"In *Const v. Harris*, 1 Turn. & R. 496, Lord Eldon said: 'The most prominent point on which the court acts in appointing a receiver of the partnership concern is the circumstance of one partner having taken upon himself the power to exclude another partner from as full share in the management of the partnership as he who assumes the power himself enjoys.'"

In *Doupe v. Stewart*, 18 Grant Ch. (Ont.) 637, where after a dissolution one partner claimed greater portions of the profits as his own by reason of certain alleged misconduct of the plaintiff, and made use of the partnership funds in carrying on business in his own behalf, it was held to be a proper cause for a receiver.

In *Young v. Buckett*, 51 L. J. Ch. 504, the partnership agreement provided that in case of disputes between the partners they should be settled by arbitration, yet a receiver was appointed.

In *Word v. Word*, 90 Ala. 81, where a surviving partner neglected to keep an account of the sales it was held that his acts were negligent and faithless and if there was danger of loss a receiver would be appointed, or the surviving partner placed under bonds to account.

In *Goulding v. Bain*, 4 Sandf. 716, the court refused to appoint a receiver where the existence of a partnership was denied, the court holding that the partnership must be either admitted or established.

¹In *Barnes v. Jones*, 91 Ind. 161, it was held that it is an exceptional case of partnership that a receiver will be appointed unless a dissolution is about to occur, but where the plaintiff shows acts of fraud on the part of the defendants and an application by them of partnership property to their own use, false entries in the books, and a refusal of access to the books and a concealment of the condition of the partnership business, a receiver should be appointed. Citing *Howell v. Harooy*, 5 Ark. 270.

In *Haight v. Burr*, 19 Md. 180, one partner controlled the business as if exclusively his own and failed to pay the debts of the firm and fraudulently appropriated the assets, it was held that a receiver should be appointed

where one partner has retired and the remaining partner is committing a fraud upon him, as by sending the funds beyond the state instead of applying them in payment of the firm debts pursuant to the dissolution agreement.¹ Also where fraudulent representations are made as an inducement for entering into the partnership agreement.²

§ 203. Where one partner is mismanaging business.

The grounds for the appointment of a receiver during the continuance of the partnership agreement, or before the expiration of the time limited for the dissolution of the copartnership, are numerous, as where one partner is destroying the firm business,³ or does not account for the firm receipts,⁴ or is violating the terms

where the defendant was irresponsible.

So also in *Blondheim v. Moore*, 11 Md. 374, the court say: "That fraud or imminent danger, if intermediate possession should not be taken by the court, must be clearly proved and that unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application."

In *Shannon v. Wright*, 60 Md. 520, it was held that a refusal to apply money to the payment of debts and a refusal to allow an examination of the books and threatening to litigate with the firm's money until the plaintiff was ruined thereby, was ground for a dissolution of the firm and the appointment of a receiver.

In *Brenan v. Preston*, 2 DeG. M. & G. 818, the defendant took possession of part of the machinery of a ship and refused to give it up. A receiver was allowed.

¹In *West v. Chasten*, 12 Fla. 315, where the firm was dissolved and the partnership assets assigned to one who assumed the debts, it was held that the property ceased to be joint property, and became the separate property of

one, the court holding: "If, however, in a case of this character and rising out of confidential relations the party acts iniquitously and unjustly or fraudulently, and pays no attention to his covenants, disregarding the claims of his surety, and is pursuing such a course as threatens to result in his great damage or injury, the court will interfere. It will not do to wait until the threatened damage or injury occurs to such an extent as to ruin the other. Then the court of equity will be powerless to act."

A receiver will not be appointed of a partnership at will in the absence of fraud and mismanagement. *Dolphin v. Steell* (C. P.) 2 Lack. L. News, 111.

²A fraudulent disposition of his interest in a firm by one of the copartners does not authorize the appointment of a receiver to settle up the partnership estate at the instance of a contract or general creditor before judgment, as the remedy at law is adequate. *Waples-Platter Co. v. Mitchell* (Tex. Civ. App.) 35 S. W. 200.

³*Sutro v. Wagner*, 23 N. J. Eq. 388; *New v. Wright*, 44 Miss. 202; *Estwick v. Conningsby*, 1 Vern. 118.

⁴*Read v. Bowers*, 4 Bro. C. C. 441.

of the partnership agreement,¹ or in case of the insolvency of one member,² or waste,³ or mismanagement,⁴ or serious disagreement such as to endanger the business,⁵ or misappropriation,⁶ or bankruptcy,⁷ or absconds,⁸ or collusion with creditors.⁹

When the partnership relation has been entered into each partner owes a duty to the other to manage the business in such way as to produce the greatest profits consistent with a judicious management, and he has no right to conduct it in such way as to endanger its success, or to result in loss to the firm. This may result from negligence and carelessness or wilful inattention, or a reckless investment, contrary to and against his copartner's will or without his knowledge and consent.¹⁰

¹ *Const v. Harris*, Turn. & R. 496; *Brenan v. Preston*, 2 DeG. M. & G. 818; *White v. Colfax*, 1 Jones & S. 297.

² *Speights v. Peters*, 9 Gill, 472; *Williamson v. Wilson*, 1 Bland, Ch. 418; *White v. Colfax*, 1 Jones & S. 297; *Todd v. Rich*, 2 Tenn. Ch. 107; *Boyce v. Burchard*, 21 Ga. 74; *Smith v. Jeyes*, 4 Beav. 508; *Williams v. Wilson*, 4 Sandf. Ch. 879; *Sutro v. Wagner*, 28 N. J. Eq. 388; *Pini v. Roncoroni*, [1892] 1 Ch. Div. 638; *Shannon v. Wright*, 60 Md. 520; *Phillips v. Traevant*, 67 N. C. 370.

³ See preceding note.

⁴ *De Tastet v. Bordicu*, 2 Bro. C. C. 272, note; *Buskin v. Boyce*, 104 Ind. 58; *Harding v. Glover*, 18 Ves. Jr. 281; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Wilson v. Fitcher*, 11 N. J. Eq. 71; *Cox v. Peters*, 18 N. J. Eq. 89; *Randall v. Morrell*, 17 N. J. Eq. 843; *Birdsall v. Colie*, 10 N. J. Eq. 68; *Page v. Vankirk*, 1 Brewst. 290; *Slemmer's Appeal*, 58 Pa. 168; *Word v. Word*, 90 Ala. 81.

⁵ *Law v. Ford*, 2 Paige, 310; *Marten v. Van Schaick*, 4 Paige, 479; *Henn v. Walsh*, 2 Edw. Ch. 129; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Chapman v. Beach*, 1 Jac. & W. 596, 4 Beav. 574; *Smith v. Jeyes*, 4 Beav. 508;

Garretson v. Weaver, 3 Edw. Ch. 385; *Jackson v. DeForest*, 14 How. Pr. 81; *Harding v. Glover*, 18 Ves. Jr. 281; *Williamson v. Wilson*, 1 Bland. Ch. 418.

⁶ *Ecans v. Coventry*, 5 DeG. M. & G. 911; *Harding v. Glover*, 18 Ves. Jr. 281; *Prentiss v. Brennan*, 1 Grant, Ch. (Ont.) 484.

⁷ *Freeland v. Stangfeld*, 2 Smale & G. 479; *Wilson v. Greenwood*, 1 Swanst. 471; *Fraser v. Kershaw*, 1 Kay & J. 496.

⁸ *Shepperd v. Owsenfield*, 1 Kay & J. 491.

⁹ *Estwick v. Conningsby*, 1 Vern. 118; *Speights v. Peters*, 9 Gill, 472.

¹⁰ In *Sutro v. Wagner*, 28 N. J. Eq. 388, it was held that where it appears that the defendant has deliberately resolved to break up and ruin the business of the firm and the personal relations between the partners were such that they could never carry on business together to advantage, a receiver was properly appointed.

In *New v. Wright*, 44 Miss. 202, it is held where a partnership concern is broken up by controversial suits and it is apparent there can be no agreement between the parties in interest a receiver will be appointed. See also

And each partner is required to keep an accurate and strict account of the receipts and disbursements, and owing to the relation of confidence existing between members of a firm the partners are not permitted to conceal from each other the financial transactions which interest all alike.

§ 204. **On ground of insolvency.**

If during the continuance of a partnership one of the partners becomes insolvent and he is in charge or in possession of the partnership effects and danger of loss is liable to result as a consequence, a receiver may be appointed. And where a dissolution has taken place, or such a state of facts shown as will justify the court in appointing a receiver and one of the partners in possession becomes insolvent and danger is likely to result therefrom it is ground for the appointment. So also where one partner has sole charge of the business and by his mismanagement the firm becomes insolvent, or where the firm is insolvent and there are mutual allegations of waste, or where the insolvency is brought about by one partner wrongfully withdrawing a large sum from the partnership funds.¹

Williams v. Wilson, 4 Sandf. Ch. 379, where the facts charged were, that the defendant had sold goods and failed to account, or refused to account; that the books were incorrect and the defendant irresponsible; and there was also a violation of the partnership agreements. Cf. *Estwick v. Conningsby*, 1 Vern. 118; *Read v. Bowers*, 4 Bro. C. C. 441.

In *Woodward v. Schatzell*, 8 John. Ch. 415, it was held that the mere apprehension of one partner that the other will misapply the partnership funds is not ground for an injunction, the same rule being applied to a receivership.

In *Const v. Harris*, 1 Turn. & R. 496, it is said that the court will entertain a bill to compel partners to act according to the provisions of the partnership contract; thus, where it was agreed that the profits should be

applied for a particular purpose and a subsequent agreement was made by a majority of the partners to apply the profits in a different manner, on the application of the owner of a one eighth interest a receiver was appointed on the ground that the partnership agreement could not be altered without the sanction of all the parties. The act of a majority of the partners, however, will bind the firm provided all parties have notice and are acting in good faith. It was also held that a bill merely for the purpose of carrying on the business will not be maintained.

¹ In *Williamson v. Wilson*, 1 Bland, Ch. 418, it is said that after a firm has become insolvent the partners are to be considered as trustees for the benefit of their creditors and therefore a suit between such partners might be considered as a creditor's suit and the

partnership estate collected and distributed accordingly. The allegation in this case was that the trading had ceased, the firm utterly insolvent and a receiver was asked as the only means of saving the partner plaintiff and the creditors from the fraudulent practices of the co-partner. The court say: "So long as a man carries on his business and has a prospect of gain he is not considered as insolvent; but if in addition to such deficiency of property his business so far declines as to leave him no prospects of paying his debts he is then, according to the universal sense of mankind, insolvent." "Insolvency is the total destruction of the pecuniary capacity of the partner to fulfill his contract of co-partnership. But his pecuniary capacity was the basis on which it rested. The contract itself must therefore be considered as effectually annulled as if the party were dead. If both be insolvent, or dead, there is no efficient or living capacity left to execute the contract. If only one be dead, or insolvent, the terms cannot be complied with; and where personal confidence was the principal inducement for making an agreement, as in contracts of this nature, it would be unreasonable; and therefore the other party should not have the executor, administrator, trustee or assignee of the deceased or of the insolvent intruded upon him. Consequently the partnership between these parties must be considered as having been virtually and effectually terminated by their insolvency. It cannot be extended over new business transactions nor be allowed to expand any more. It must be wound up and brought to a close; and except for such purposes must be deemed to have totally ceased to exist." See *Ex parte Williams*, 11 Ves. Jr. 5; *Harding v. Glover*, 18 Ves. Jr. 281;

Vulliamy v. Noble, 3 Meriv. 614; *Crawshay v. Maule*, 1 Swanst. 506.

"While a man continues solvent the order in which he pays his creditors is a matter of indifference since none can suffer; and therefore no creditor has the right to complain of the rights given to another. But as soon as he becomes insolvent that privilege ceases; and equity requires that he should make an equal distribution among them all. The giving of undue and improper preference in such circumstances is denounced by the express provisions of our insolvent laws as a fraud. And in all cases where the court of chancery can be called upon and does interpose for the purpose of administering the assets of an insolvent debtor it is governed by the rule of equality; because equality is equity. The assets, if insufficient to pay all, are always distributed proportionately. * * * These parties admit themselves to be insolvent debtors. The plaintiff charges his co-partners, the defendants, with a design to waste the joint property and apply it to their own use. The defendants deny this allegation and charge the plaintiff with a design to misapply the funds and give some of the creditors undue preference. Taking the charges of the plaintiff and of the defendants, or either of them, to be true or allow that each or either party was about to waste the property, or has his favorite creditors to whom it is his design to give an undue preference, and it is clear that one or the other or both of them have formed a fixed resolution to violate one of the great principals of equity which it is the province of this court to prevent. None of the creditors of these insolvent debtors, so far as it appears, have as yet obtained any legal advantage. It is proper therefore that this court should now lay its

Bankruptcy of one partner is also a sufficient ground for the appointment.¹

hands upon the joint property of this partnership and let all its creditors come in *pari passu* and according to their respective priorities, if any should appear."

In *White v. Colfax*, 1 Jones & S. 297, it is held that although the articles of distribution vest the right of winding up the partnership in some one or more of the partners, yet when they violate the terms of the dissolution agreement, such as refusing access to the books, and when the feeling is such that the right of supervision cannot be exercised without great embarrassment or unpleasantness a receiver should be appointed.

In *Boyce v. Burchard*, 21 Ga. 74, where one partner in violation of his duty mismanages the partnership business to the great detriment of the partnership and is insolvent it was held the other partner was entitled to a distribution and a receiver.

In *Smith v. Jeyes*, 4 Beav. 503, it is held that the specific contract of partnership cannot and does not cover all the implied duties of the partners to each other.

In *Pini v. Roncoroni* [1892] 1 Ch. Div. 633, one partner withdrew from the partnership a large sum of money and this brought about its insolvency; a receiver was appointed although the partnership agreement provided for referring the matters in dispute to arbitration.

In *Randall v. Morrell*, 17 N. J. Eq. 343, the court say: "But with the circumstance of the insolvency of one of the partners in addition to the fact of the dissolution of the firm would under ordinary circumstances induce this court to assume the administration of the partnership affairs, I think, ad-

mits of no doubt. * * * It is only by the united efficacy of these two safeguards (injunction and receivership) that when insolvency supervenes the estate of the co-partnership can be secured and preserved for the benefit of those to whom they equitably belong.

In *Sutro v. Wagner*, 23 N. J. Eq. 388, there was a fraudulent appropriation of the partnership funds and a fraudulent conveyance of the partnership property of one partner, in order to place it beyond the reach of the creditors and giving notice of such transfer to a commercial agency to ruin the credit of the firm and it was held a receiver should be appointed. Cf. *Shannon v. Wright*, 60 Md. 520; *Phillips v. Trezvant*, 67 N. C. 370.

¹ *Fraser v. Kershaw*, 2 Kay & J. 496. The bankruptcy of one partner puts an end to the partnership, but the solvent partner cannot transfer his right to another by assignment or otherwise to wind up the concern, or permit the same to be sold on an execution. In *Wilson v. Greenwood*, 1 Swanst. 471, it is held that on the bankruptcy of one partner the partnership in one sense is determined, but is continued until all the partnership affairs are settled. In *Freeland v. Stansfeld*, 2 Smale & G. 479, on the bankruptcy of one partner the solvent partner is entitled to a receiver and the assignee has no right to interfere with the partnership matters and with the collection of the partnership debts.

A firm whose articles provide that if any partner becomes bankrupt he shall cease to be a partner, and his share in the capital shall remain as a loan during the remainder of the partnership term, the solvent partner is

§ 205. Where dissolution has taken place.

When there has been a dissolution of the copartnership by limitation, or by mutual agreement, or otherwise, and the partnership agreement is silent as to the method of closing up the business, and the members of the firm cannot agree in reference thereto, a receiver may be appointed. And so where upon the dissolution an agreement has been made as to the winding up of the business, and the agreement is being violated in such a way as to result in loss.

Where a partnership has been dissolved and the partners have agreed among themselves as to a mode of collecting the accounts, in the absence of proof of irresponsibility the court will not appoint a receiver,¹ but where there is a serious disagreement

entitled to be appointed receiver and manager of the business, but he must give security, pass his accounts, furnish proper accounts to trustees, allow them all reasonable access to the books, and pay the balances in his hands into court, or into a joint banking account of such trustees and himself. *Collins v. Barker* [1893] 1 Ch. Div. 578.

¹ *White v. Coffey*, 1 Jones & S. 297. Upon the dissolution, partners may make such an agreement as to the winding up as they shall deem fit, and a court of equity will not interfere and appoint a receiver unless the parties prove recreant to the trust imposed on them. When such an agreement has been made all the members of the firm are entitled to have supervision over the acts of those selected, to receive information from them respecting collections made, to ask for and have imparted information why collections are not pressed, and have access to the books of the firm; and if those selected deny this right or unreasonably interfere with its exercises, or even if the relations of the parties are so changed that the exercise of this right would reasonably be ex-

pected to be attended with unpleasantness or embarrassment, the court will appoint a receiver. In this case the feeling of friendliness had changed into bitter enmity and under such circumstances it would be unreasonable to anticipate that the plaintiff's right of supervision, etc., could any longer be exercised without great unpleasantness and embarrassment, if indeed it could be exercised at all.

In *Simon v. Schloss*, 48 Mich. 233, it is said that where the partners have agreed as to the winding up and where the defendants are responsible the court will not interfere by the appointment of a receiver until a hearing on the merits.

In *Brush v. Jay*, 118 N. Y. 482, overruling 50 Hun, 446, it is held that it is manifestly improper to determine a material issue upon affidavits in anticipation of the trial and determination of the issues joined. The court say: "We know of no practice which authorizes the court in this manner to defeat the object of the litigation and place the subject of the action beyond the reach of the court ultimately to award it to those showing title thereto. We do not think the special term

between them concerning the winding up, or the dissolution agreement, the court will do so;¹ and it seems that this may be

had authority to take up on motion one of the material issues of the case and under objection by one of the parties make an order which was practically a final judgment in respect to the property involved in such issue."

In *Mitchel v. Lister*, 21 Ont. Rep. 22, it is held that where the partnership articles provided that on dissolution, the partners should select a person to collect the accounts and settle the partnership affairs, the court would, upon a failure of the parties to agree on some person, appoint a receiver. Cf. *Davis v. Amer.* 5 Drew. 64; *Law v. Garrett*, L. R. 8 Ch. Div. 26; *Pleves v. Baker*, L. R. 16 Eq. 564.

In *Harding v. Glover*, 18 Ves. Jr. 281, it was held that a receiver would not be appointed upon a mere dissolution but there must be some breach of duty of a partner or of the contract of partnership. In this case the defendant had been carrying on business on his own account with the partnership funds and a receiver was appointed.

So in *Estwick v. Coningsby*, 1 Vern. 118, a surviving partner was carrying on the business but was neglecting the collection of the debts, a receiver was ordered in default of security required.

In *Smith v. Jeyes*, 4 Beav. 508, it was held that the plaintiff must show a dissolution or such facts as would warrant a dissolution before the court would interfere.

¹In *Speights v. Peters*, 9 Gill, 472, where after dissolution the partners failed to agree upon an adjustment, the funds being in the hands of one partner, a receiver was appointed.

It was held that it was not always necessary that the court should be satisfied that the property is in immi-

nent peril and that where one partner in the ordinary course of trade seeks to exclude another from taking that part in the concern which he is entitled to take, a receiver should be appointed. And after dissolution takes place, or is intended, if one partner acts against the interest of the other or carries on trade with the partnership funds, or in any other manner excludes his copartner from that share to which he is entitled in winding up the concern, a court of equity will appoint a receiver.

A receiver was refused in *Fairburn v. Pearson*, 2 Macn. & G. 144, where the question raised was whether the partnership had been dissolved or not.

In *Re Hermanos*, L. R. 24 Q. B. Div. 640, it appeared that a Paris firm having a branch office in England had been declared a bankrupt in the former country where a syndicate had been appointed to administer the estate. Subsequently a bankruptcy petition was presented in England and an order made for a receiver. The syndicate appeared in court and moved to set aside all further proceedings. There was no evidence as to the domicile of the firm further than that two of the parties resided in England where the firm had large assets. The court held that it had jurisdiction to appoint a receiver, and that the fact that a bankruptcy proceeding had been commenced prior in a foreign country not shown to be the domicile of the debtors, was no ground for staying the proceedings in England.

In *Fischer v. Tuolumne County Super. Ct.* 98 Cal. 67, the title of a mine belonging to a partnership was in the name of a corporation, the latter

done without notice to nonresident partners, where the resident partners appear;¹ and is applicable to limited partnerships as well.²

however, possessing no interest in the property. It was held that the court was authorized to appoint a receiver for such property in an action for dissolution and accounting, notwithstanding the legal title to the property was in the corporation. *Cf. Bufkin v. Boyce*, 104 Ind. 58.

In *Smith v. Lowe*, 1 Edw. Ch. 88, it was held that the plaintiff being in possession of the partnership property, was not entitled to a receiver, the other partner not objecting to his possession.

In *Martin v. Smith*, 21 Jones & S. 277, where a dissolution had been made by agreement and subsequently one of the members died, it was held that his death was not an objection to the appointment of a receiver.

In *McElvey v. Lewis*, 76 N. Y. 878, it was held that where no time was fixed for the continuance of the partnership, and no provision made for a settlement upon such dissolution, such partnership is dissolvable upon the will of one partner and the appointment of a receiver is proper. *Cf. Law v. Ford*, 2 Paige, 810; *Marten v. Van Schaick*, 4 Paige, 479.

In *Dunn v. McNaught*, 88 Ga. 179, where the contract provided that upon giving six month's notice if the firm did not pay ten per cent profits on the capital, the firm should be dissolved, and the evidence showed that it did not pay ten per cent, the partnership was terminated and a receiver appointed. *Cf. Hamill v. Hamill*, 27 Md. 679.

¹In *Alford v. Berkele*, 29 Hun, 688, an action was brought for dissolution where the resident partners appeared and it appeared that no notice was served upon the nonresident defendant partner, but the court appointed

a receiver upon the authority of *People v. Norton*, 1 Paige, 17; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 488; *Bloodgood v. Clark*, 4 Paige, 574.

In *Ogden v. Warren*, 86 Neb. 715, a receiver was appointed of the partnership goods of a foreign partnership having effects in the state of Nebraska.

²In *Hogg v. Ellis*, 8 How. Pr. 478, the court appointed a receiver in a case of limited partnership on the ground of disagreement of partners as in other cases.

In *Van Alstyne v. Cook*, 25 N. Y. 489, it was held that until the order of appointment is made the property of an insolvent limited partnership is liable to execution of a creditor recovering a judgment otherwise than by confession, and such creditor may thus obtain a preference, the execution binding the partnership property although the judgment is against the general partners only. "The members of a limited partnership before or after insolvency are just as liable to suit for their debts as other natural persons. Their creditors are entitled to recover judgment against them with a view of reaching the individual property as well as partnership property." Speaking of the nature of the property of a limited partnership the court further say: "They are not trust funds in the hands of partners any more than ordinary partnerships. There is no rule of equity which makes them trust funds in any other sense or which gives a court of equity any control over them, or which forbids any creditor of the copartnership, or of any individual, from obtaining a lien on them by due process of law in any hostile proceedings."

The mere fact that a partnership business is unprofitable, and should be discontinued is not of itself ground for a receiver;¹ nor that the firm is largely indebted and is not making money;² nor want of co-operation between the partners;³ and facts must be stated in the bill showing the necessity or propriety of the appointment.⁴

§ 206. Before dissolution.

In case of an existing partnership before the court will intercede and appoint a receiver it must be made clear that in the end, or when the final decree is rendered, a decree for dissolution will be rendered. Hence it has become a rule of universal application that the plaintiff must make out a strong case, the allegations must be distinct and positive, and relate to matters of substantial importance, and the court must be satisfied that the continuation of the business, under the firm management, is no longer possible without sacrifice of the interests of the partners, or of the firm creditors. The appointment of a receiver must inevitably result in the dissolution of the firm, and the destruction of its business, and therefore the court will intercede with great caution in all cases where the firm has not already been dissolved by agreement, or otherwise.⁵ It must likewise appear in an action based upon

¹ *Moies v. O'Neill*, 23 N. J. Eq. 207.

² *Shoemaker v. Smith*, 74 Ind. 71.

³ *Roberts v. Eberhardt*, Kay, 148. It must be shown in addition that one partner has interfered so as to prevent the business being carried on.

⁴ *Tomlinson v. Ward*, 2 Conn. 396; *Const v. Harris*, 1 Turn. & R. 496.

⁵ *Barnes v. Jones*, 91 Ind. 161. There may be cases independent of statutory provisions where a receiver may be appointed to bridge over an emergency without a dissolution of the partnership, but the general rule is that a receiver for the business of a firm will not be appointed unless a dissolution has taken place or is about to take place. *Dale v. Kent*, 58 Ind. 584.

In *Const v. Harris*, 1 Turn. & R.

496, it is said that the court will sometimes entertain a bill to compel partners to act according to the partnership agreement and appoint a receiver; but the general rule announced in *Smith v. Jeyes*, 4 Beav. 503, is that there must be either a dissolution or such facts alleged which if proven at the hearing would entitle the plaintiff to a decree for dissolution. Cf. *Roberts v. Eberhardt*, Kay, 148. The rule laid down in *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172, is that there must be a cause for dissolution shown and as to what is a sufficient cause, it may be shown (1) that the business of the partnership is impracticable and cannot be carried on except at a loss. Citing *Baring v. Dix*, 1 Cox, Ch. 218; *Jennings v. Baddley*, 8 Kay & J. 78;

disagreements and dissensions that no adjustment is probable.¹ And yet even where the action results in a dissolution the appointment of a receiver will not necessarily follow, for in such a case there must be evidence of mismanagement, misconduct, or danger.²

Boiley v. Ford, 18 Sim. 495. (3) That all confidence between the partners has been destroyed so that they cannot proceed together; and this usually follows where one partner has been guilty of mismanagement. Citing *Harrison v. Tennant*, 21 Beav. 483; *Baxter v. Welsh*, 1 De G. & S. 173. See also *Goodman v. Whitcomb*, 1 Jac. & W. 589.

¹In *Law v. Lord*, 2 Paige, 810, it is said that the appointment is a matter of course where either party has a right to dissolve the partnership, where the partners have not made provisions for winding up the partnership. So also in *Marten v. Van Schaick*, 4 Paige, 479, where the parties could not agree among themselves as to the disposition and control of the property.

In *Henn v. Walsh*, 2 Edw. Ch. 129, it is held that mere dissatisfaction among the partners is not enough to authorize the filing of a bill for dissolution; to authorize a receiver there must be such a state of facts as would authorize a decree of dissolution, such as breach of duty or of the contract. Quarrels among the partners is not enough.

In *Garretson v. Weaver*, 8 Edw. Ch. 385, it is held that the court will not interfere by appointing a receiver of a subsisting partnership unless it satisfactorily appears that the plaintiff will be entitled to have the partnership dissolved and wound up, but a receiver will not necessarily be appointed because an injunction is granted. See also *Jackson v. De Forest*, 14 How. Pr. 81.

In *Williamson v. Wilson*, 1 Bland, Ch. 418, there were mutual charges made by the partners against each other any one of which it was held being sufficient to warrant a dissolution of the partnership a receiver was appointed, insolvency being admitted on both sides.

In *Harding v. Glover*, 18 Ves. Jr. 281, it is held that a receiver would not be appointed merely upon the ground of a dissolution of the partnership, but that there must be a breach of duty by one partner or a breach of the contract.

²In *Buskin v. Boyce*, 104 Ind. 53, it was held that where the partnership expired by limitation and neither partner was desirous of continuing the business a receiver would not be appointed in the absence of a showing of mismanagement or improper conduct.

In *Renton v. Chaplain*, 9 N. J. Eq. 62, one partner's interest was sold under an execution and it was held that this operated as a dissolution of the firm if there was any fraud between the purchaser and the insolvent partner. If the sale is *bona fide* the purchaser in such case stands in no better condition than the insolvent defendant to whose rights he has succeeded, and the court will not interfere with the remaining partner in winding up the business unless gross misconduct calls for it. Cf. *Birdsall v. Colie*, 10 N. J. Eq. 63.

In *Cox v. Peters*, 13 N. J. Eq. 89, it was held that where the partnership was dissolved by mutual consent or determined by the will of either party

the court would not appoint a receiver as a matter of course, but this would only be done where it was necessary to protect the interests of the parties. And where one partner advances all the capital and the other partner is only interested in the profits, in the absence of insolvency or irresponsibility or proof of fraud a receiver will not be appointed.

Randall v. Morrell, 17 N. J. Eq. 343, was a case where the defendant was insolvent and a receiver was appointed.

In *Page v. Van Kirk*, 1 Brewst. 282, the court say: "Although the partnership agreement provides for a notice of six months of the intention of dissolving the partnership and a clause in the agreement provides for arbitration, yet a court of equity in a proper case will appoint a receiver, such as excluding one partner from his share in the management of the concern, and refusing information; also using the partnership money for private purposes, impracticability of carrying on the business. In this case the court ably reviews all of the authorities authorizing a dissolution of the partnership before the time limited therefor by the partnership agreement, and states the following items of mismanagement for which the court will decree a dissolution: (1) where one of the partners permits a friend, without the consent of the other partner, to draw upon the concern for a large amount. Citing *Master v. Kirton*, 3 Ves. Jr. 75. (2) Where the conduct of the parties makes it impossible to carry on the business upon the terms stipulated, citing *Walters v. Taylor*, 2 Ves. & B. 304. (3) Where one partner refuses another permission to inspect the books, sells goods for an inadequate price, and appropriates partnership funds to his own use, etc." Citing

Goodman v. Whitcomb, 1 Jac. & W. 589; *Chapman v. Beach*, 1 Jac. & W. 594. It is also held that in case of occasional breaches, but not of such grievous nature as to make it impossible that the partnership could continue, the court will stand neutral. *Loscombe v. Russell*, 4 Sim. 11.

In *Smith v. Mules*, 9 Hare, 556, it was held that a refusal by one partner to enter proper receipts is ground for a receiver. As to the refusal of the court to dissolve a partnership on slight ground, see *Anderson v. Anderson*, 25 Beav. 190; *Stemmer's Appeal*, 58 Pa. 168. In the latter case it was held that where the partnership cannot be longer continued with comfort and advantage to all concerned a dissolution will be granted, but in doing so the court will consider the agreement and the duties and obligations of the parties expressed and implied.

In *Irwin v. Everson*, 95 Ala. 64, which was a suit for settlement between partners, a receiver was denied on the ground that the defendant in possession denied the partnership and was solvent and able to respond for all damages, upon the authority of *Peacock v. Peacock*, 16 Ves. Jr. 49; *Fairburn v. Pearson*, 2 Macn. & G. 144; *Goulding v. Bain*, 4 Sandf. 716; *Hubart v. Ballard*, 31 Iowa, 521; *Williamson v. Monros*, 8 Cal. 388; *Popper v. Schreider*, 7 Abb. Pr. N. S. 56.

In *Smith v. Lowe*, 1 Edw. Ch. 33, a receiver was refused on the ground that the plaintiff was in possession of the partnership property.

In *Loomis v. McKenzie*, 31 Iowa, 425, it was held that ill-feeling or differences between the partners which are not shown to have resulted from the fault of the defendant will not justify the appointment. Cf. *McCracken v. Ware*, 3 Sandf. 688.

§ 207. On miscellaneous grounds.

Where a partner absconds,¹ or appropriates the partnership property or funds to his private use,² or where partnership money is improperly withdrawn and invested on private account, or where the partnership books are taken into a foreign jurisdiction in violation of an injunction,³ or where one partner is acting in collusion with creditors,⁴ or when the conduct of one partner is such, or the condition of the business is such, as a result of mismanagement, that serious loss is apparent a receiver will be appointed.

§ 208. Appointment refused when.

A receiver will not be appointed in relation to rights arising from joint transactions where such transactions have been consummated, in the absence of proof of insolvency or danger of loss,⁵ nor where the ground alleged is the mere refusal of one partner to assist in the management of the business,⁶ nor where the partnership is denied, insolvency not appearing,⁷ nor on the application of a *cestui que trust* having but a small interest, where the appointment would affect large interests of contractors and other third persons,⁸ nor where the partner in possession will give se-

¹*Sheppard v. Ozenford*, 1 Kay & J. 491.

²In *Prentiss v. Brennan*, 1 Grants Ch. (Ont.) App. 484, it appeared that a partner had purchased a house with partnership funds, had withdrawn all partnership books from the jurisdiction of the court a receiver was appointed.

³*Prentiss v. Brennan*, *supra*.

⁴In *Estwick v. Coningsby*, 1 Vern. 118, a surviving partner was carrying on business with debtors of the late firm and forbearing the collection of debts against them; a receiver was appointed. See also *Speights v. Peters*, 9 Gill, 473.

⁵In *McIntosh v. Perkins*, 18 Mont. 148, it is said that where it appears from the complaint that all the joint

operations had been consummated except the collection of the debts and there remains simply a dispute as to the proper apportionment of the fund arising from the business, no averment being made as to insolvency or danger of loss, a receiver should not be appointed.

⁶In *Roberts v. Eberhardt*, Kay, 148, it was held that merely because the partners did not co-operate in the business was no ground for a receiver.

In *Ross v. Wood*, 3 Jac. & W. 558, a mortgagee became a partner or joint owner and was in possession of the property; a receiver was refused.

⁷In *Irwin v. Eversen*, 95 Ala. 64, where the defendant denied the partnership, a receiver was refused.

⁸*Devlin v. Hope*, 16 Abb. Pr. 814.

curity;' nor will the court appoint as against a non-resident purchaser of an interest in the firm.³

§ 209. Receiver's power and duty.

The receiver's general powers and duties have elsewhere been fully considered, and they are not in partnership matters materially different from those applicable to other classes of receiverships. But we repeat in this connection a few of the general principles relating to the power and duty of receivers which have received the sanction of the courts in litigation growing out of partnership relations.

(a) A receiver *pendente lite* must look to the order of appointment for the general scope of his power.⁴

(b) The legal title to the partnership property does not vest in him.⁵

³ In *Buchanan v. Comstock*, 57 Barb. 568, a receiver was refused before it was determined how much of the partnership effects belonged to each partner, where no insolvency was alleged and the defendant denied the entire equity of the complaint but offered to convey one half of the stock to the plaintiff to indemnify him.

In *Saverios v. Leoy*, 1 N. Y. S. R. 758, the defendant offered to execute a bond in such sum and with such sureties as the court might require, conditioned to obey all orders of court; a receiver was refused. In *Popper v. Schreider*, 7 Abb. Pr. N. S. 56, the partnership was denied and but a small portion of the capital was controlled by the plaintiff and the defendants were willing to give security, a receiver was refused. *McDonald v. Trojan*, 56 Hun, 648 (mem.)

⁴ *Harvey v. Varney*, 104 Mass. 486. This rule was applied in case of a non-resident partner, where it appeared he was acting in good faith. *Evans v. Evans*, 9 Paige, 178; but see *contra* *Sheppard v. Ozenford*, 1 Kay & J. 491.

⁵ In *Fincke v. Funke*, 25 Hun, 616,

where an action was commenced by an administrator against the two remaining partners, after a receiver was appointed. The court held that the receiver had no specific authority conferred upon him to bring actions and that the title of the property did not vest in him; that the receiver in a partnership case is vested only with such power as is conferred upon him by the order; that he is merely a common law receiver whose duty is only to protect the property, the title therein remaining in the partnership.

⁴ In *Tillinghast v. Champlin*, 4 R. I. 173, it was held that the receiver in a partnership case is vested with the whole equitable title to the partnership property. For a full discussion of the powers and rights of receivers, see *Idding v. Bruen*, 4 Sandf. Ch. 417; *Hutchinson v. Massareene*, 2 Ball & B. 55; *Davis v. Duke of Marlborough*, 2 Swanst. 118; *Green v. Bostwick*, 1 Sandf. Ch. 186; *Mann v. Pente*, 2 Sandf. Ch. 271; *Waring v. Robinson*, 1 Hoffm. Ch. 532.

In *Wallace v. Yeager*, 4 Phila. 251, it was held that the receiver succeeds

(c) He cannot loan the receivership funds to himself or to the firm of which he is a member.¹

(d) He is the representative of the interests of all parties concerned, and the special representative of none.²

(e) He must use ordinary and reasonable diligence in the execution of his trust.³

(f) He may maintain an action in another state to set aside an assignment made by one partner to a creditor in fraud of another creditor where there are no local creditors having rights affected thereby,⁴ and generally may sue in his own name to collect all debts.⁵

(g) He has no greater power concerning the winding up of the partnership business than the partners possessed.⁶

not only to the legal title of the partners as joint tenants, but also to the equitable rights and remedies of the firm. *Pearce v. Gamble*, 72 Ala. 841; *Smith v. Danvers*, 5 Sandf. 669. Cf. *Ooa v. Volkert*, 86 Mo. 505.

In *Ogden v. Arnot*, 29 Hun, 146, it was held that where one member of a firm becomes insolvent and makes a general assignment for the benefit of his creditors, the partnership is thereby dissolved and the solvent partner has a right to close up the business. In this case in an action brought by the solvent partner to wind up the business, the right of a receiver to sue is discussed.

In *Keeney v. Home Ins. Co.*, 71 N. Y. 396, an action was brought to dissolve the partnership and it was held that the receiver took no title to the property; the court say: "A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. The title of the property is not changed by the appointment. The receiver acquires no title and only the

right of possession as an officer of the court. The title remains in those in whom it was vested when the appointment was made. The object of the appointment is to secure the property pending the litigation so that it may be appropriated in accordance with the rights of the parties as may be determined by the judgment in the action." Citing *Skip v. Harwood*, 3 Atk. 564; *Gresley v. Adderly*, 1 Swanst. 573; *Thomas v. Brigstocke*, 4 Russ. 65; *Bertrand v. Davies*, 31 Beav. 436; *Green v. Bostwick*, 1 Sandf. Ch. 165; *Singerly v. Fox*, 75 Pa. 112; *Kirkpatrick v. Corning*, 38 N. J. Eq. 284.

¹*Ryan v. Morrill*, 83 Ky. 352.

²*Tillinghast v. Champlin*, 4 R. I. 178 (189).

³*Johnston v. Keener*, 23 Ill. App. 220.

⁴*Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *Sloan v. Moore*, 37 Pa. 217.

⁵*Henning v. Raymond*, 85 Minn. 303.

⁶*Niemann v. Niemann*, L. R. 43 Ch. Div. 198; *Wickersham's Case*, L. R. 8 Ch. 881, 28 L. T. 653.

§ 210. Effect of appointment.

The effect of the appointment of a receiver as to creditors having liens is the same as in other cases, all liens remaining unaffected by the appointment, and no levies of execution or attachment being permitted thereafter to interfere with the possession of the court through the receiver, and no rights being determined thereby.¹

¹ In *Davenport v. Kelly*, 43 N. Y. 193, it is said that a judgment creditor acquires no preference by the commencement of an action in the nature of a creditor's bill until the appointment of a receiver therein over a junior judgment, as to personal property which is the subject of a levy and sale on execution. Citing *Storm v. Waddell*, 2 Sandf. Ch. 494, 516; *Van Alstyne v. Cook*, *supra*. It is very clear that as to personal property which is the subject of levy and sale on execution a creditor by an equity suit acquires no preference as against a judgment creditor of the debtor until the entry of an order appointing a receiver in such equity suit. The vigilant creditor, who by his execution seizes and sells the property of his debtor before the appointment of a receiver in an equity action, secures a preference which the law sanctions and protects.

In *Knobe v. Baldrige*, 78 Ind. 54, a member of the partnership died and a receiver was appointed to take possession of the partnership property, but it was held that no creditor had a right to have such property seized and sold on execution for his own benefit.

In *Waring v. Robinson*, Hoffm. Ch. 524, it was held that when a partnership was dissolved and a receiver appointed, notice of which was published in a paper circulating in the town where the defendant lived, the payment of a debt to one of the partners would be void if he had notice of

the appointment brought home to the debtor; and that the filing of a bill was not a dissolution, but the receiver was appointed in anticipation that a dissolution must take place. After the appointment of a receiver one partner cannot give preference to creditors.

In *Adams v. Hackett*, 7 Cal. 187, where one partner filed a bill for dissolution of the partnership and the appointment of a receiver it was held that until the dissolution had been judicially declared and a receiver ordered to make distribution, creditors are not prevented from asserting adverse proceedings and gaining a preference. Cf. *Adams v. Woods*, 8 Cal. 152, 9 Cal. 24; *Naglee v. Minturn*, 8 Cal. 540.

In *Hanneh v. Chase*, 1 Bland, Ch. 213, it was held that the appointment does not involve the determination of any right, or affect the title of either party in any manner whatever. "From this case it seems to be settled," the court say, "that until a dissolution has been judicially declared and a receiver ordered to make a *pro rata* distribution of the partnership assets among the creditors they are not prevented from resorting to adverse proceedings and that when a creditor does resort to such proceedings he may thereby gain a preference over other creditors who are less diligent." The reason of the above rule is based upon the fact that the proceeding is between partners and the plaintiff

§ 211. Receiver as manager.

A court of equity is averse to appointing a receiver to continue a partnership business indefinitely, and generally will refrain from so doing. But there are cases where the court in the exercise of a sound discretion is justifiable in authorizing the receiver to continue the business in order that it may be sold as a going concern. It not unfrequently happens that a valuable partnership business consists largely of the goodwill of the concern, in which case the cessation of business works an immediate and permanent loss and destroys the almost only element of value in the business, and thus not only the interest of the members of the firm is sacrificed but often the interest of creditors as well. Under such circumstances the court is not only justified but it is highly commendable to continue the business a reasonable time having, of course, in mind the sale of the partnership effects and

may at any time dismiss his bill. But see *Waring v. Robinson*, *supra*.

In *Blakeney v. Dufaur*, 15 Beav. 40, the Master of Rolls says: "The province of this court upon a motion for a receiver is quite clear; its duty is merely to protect the property and not to decide the ultimate rights between the parties."

In *Gregory v. Gregory*, 1 Sweeny, 618, the court refused to appoint a receiver over specific property without satisfactory proof that such specific property is in fact partnership property.

In *Higgins v. Bailey*, 7 Robt. 613, it was held improper for the court to appoint a receiver upon motion and undertake to determine what is partnership property as between the partners and third persons.

In *Morey v. Grant*, 48 Mich. 326, it is said that in an interlocutory order there should be embraced a finding of such facts as would give authority for divesting the possession of the defendant, and when made, after the evidence is in, the necessity that the court should find that the necessary facts were made out is still more ob-

vious. To appoint a receiver at that stage of the case without first adjudging the merits upon which the right or the propriety of the appointment necessarily depend was very plainly erroneous and must, we think, have been inadvertent.

A receiver of a partnership appointed in an action by one partner against the other cannot be garnished in an action by a creditor of the firm without leave of the court appointing him. *Blum v. Van Vechten*, 92 Wis. 878.

After a receiver is appointed the property is in the control of the court and cannot be levied on by attachment or other judicial process. *Jackson v. Lahee*, 114 Ill. 237; *McGowan v. Myers*, 66 Iowa, 99.

If, however, the partnership has been wound up and there is a balance in the hands of a receiver which belongs to one partner it is subject to the rights of creditors. *Willard v. Decatur*, 59 N. H. 137.

A purchaser of one partner's interests after the appointment is subject to the rights of the receiver. *Noonan v. McNab*, 80 Wis. 277.

goodwill at the earliest practicable moment. The court, however, under no circumstances will be made a medium through its receiver, of tiding the firm over temporary or threatened insolvency.¹

The appointment of a receiver in matters of this character has reference to the final winding-up and dissolution of the partnership and not a continuation of the business as a going concern.

¹In *Morrell v. Pemberton*, 63 Ga. 29, the defendant had no place of business, and if the plaintiff had any it was beyond the limits of the state. The court refused to appoint a receiver for the purpose of opening up a house for the manufacture and sale of medicines, on the ground that it is only where a place of business is established that the court will appoint a manager.

In *Hall v. Hall*, 8 Macn. & G. 79, the purpose of the suit was to continue the business through a receiver. It was held that the object being to continue the partnership it was not according to the practice of the court to appoint a receiver. See also *Wilson v. Greenwood*, 1 Swanst. 471; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *Watworth v. Holt*, 4 Myl. & C. 619; *Const v. Harris*, Turn. & R. 496. "The conclusion," the court says, "I come to is that by the rule and practice of this court, a receiver or manager is only granted where it is ancillary to the object of dissolution.

In *Roberts v. Eberhardt*, Kay, 148, it is said that where the purpose is the appointing of a receiver to continue the business the court does not readily grant the order.

In *Jackson v. De Forest*, 14 How. Pr. 81, it was held that the court would not take upon itself the responsibility of carrying on the partnership business. In some cases where it may be necessary to secure the goodwill of the partnership business to the purchaser and the full

value of the partnership property to the partners on the sale a receiver is allowed to carry on the business until he can make a favorable sale of the property. Cf. *Dayton v. Wilkes*, 17 How. Pr. 510, where sufficient time was allowed to dispose of the property advantageously. *Marten v. Van Schaick*, 4 Paige, 479, is to the same effect.

In *Allen v. Hawley*, 6 Fla. 142 (164), it is said that it could never have been contemplated that a court of chancery should become the superintendent of the private affairs of individuals. Its legitimate purpose is to adjust the rights and settle the disagreements of the parties growing out of such transactions. See also *Wolbert v. Harris*, 7 N. J. Eq. 605.

In *Heatherton v. Hastings*, 5 Hun, 459, the court say: "Although ordinarily a court of equity will not undertake to carry on the business of contending parties by means of a receiver, yet cases sometimes arise where the refusal to do that for a limited period would result in great loss to the persons interested. That such cases are exceptional and justify, as well as require, the exercise of authority which, under other circumstances, would be plainly improper." Citing, among other cases, *Orane v. Ford*, Hopk. Ch. 114, and *Jackson v. De Forest*, 14 How. Pr. 81. See also *McMahon v. McClernan*, 10 W. Va. 419; *Taylor v. Neate*, L. R. 39 Ch. Div. 538; *Marten v. Van Schaick*, 4 Paige, 479; *Williams v. Wilson*, 4 Sandf. Ch. 379.

CHAPTER XII.

RECEIVERSHIP OF CORPORATIONS.

- § 220. Jurisdiction.
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§ 220. Jurisdiction.

Courts of equity, in the exercise of their ordinary chancery jurisdiction, have not the power to appoint a receiver over a corporation, and thus place the management of its business and affairs in the hands of an officer of court. Such courts, not having inherent power to wind up a corporation, cannot indirectly, through the appointment of a receiver, accomplish what cannot be done directly. There must be found statutory power and authority vested in courts of equity, or courts exercising equitable jurisdiction, enabling them through a receivership to wind up incorporated companies, and

distribute their assets to creditors and shareholders, or other persons entitled thereto.¹ As to the question of conflict of jurisdic-

¹A court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business, as it may do in cases arising between members of an ordinary partnership. It is for the reason that corporations have a legislative power where the directors or shareholders are duly convened that is fully adequate to settle all questions affecting their business interests or policy, and they should be left to dispose of all questions of that nature without applying to courts for relief. A stockholder cannot invoke the power of this court to control its officers or board of managers, or to wrest the corporate property from their charge through the agency of a receiver so long as they neither do, nor threaten to do, any fraudulent or *ultra vires* acts, and so long as they keep within the limits of the by-laws which have been prescribed for their governance. *Hawes v. Contra Costa Water Co.* ("Hawes v. Oakland") 104 U. S. 450, 26 L. ed. 828; *Oglesby v. Attrill*, 105 U. S. 605, 26 L. ed. 1186; *French v. Gifford*, 30 Iowa, 148. It is also true and well established that a court of equity has no power, at the suit of an individual, to decree a dissolution of a domestic corporation and a winding up of its affairs unless such extraordinary power has been conferred upon it by the terms of some statute, even though such power, has been invoked by the state through its attorney general. *Folger v. Columbian Ins. Co.* 99 Mass. 267; *Slee v. Bloom*, 5 Johns. Ch. 866; *French v. Gifford*, 30 Iowa, 148; *Atty. Gen. v. Chicago & N.*

W. R. Co. 85 Wis. 425; *Baker v. Louisiana Portable R. Co.* 84 La. Ann. 754. Much less can they exercise such power with reference to a foreign corporation. For the courts of a state have no visitatorial power over foreign corporations doing business within the state unless such power is expressly conferred by local statutes. *North State Copper & G. Min. Co. v. Field*, 64 Md. 151; *Wilkins v. Thorne*, 60 Md. 253. Cf. *Republican Mountain Silver Mines v. Brown*, 58 Fed. Rep. 644, 24 L. R. A. 776.

In *Patten v. Accessory Transit Co.* 4 Abb. Pr. 235, 13 How. Pr. 502, it is held that the appointment of a receiver of chattel property in the possession of a mortgagee, except where it is necessary to secure the rights of other parties, is an impairment of the obligation of contract between the parties and is therefore beyond the constitutional power of both court and legislature. As to the want of power of courts of equity independent of statutory authority to dissolve corporations and wind up their business, see *Adler v. Milwaukee Patent Brick Mfg. Co.* 18 Wis. 57; *Hinckley v. Pfister*, 83 Wis. 64; *Pond v. Framingham & L. R. Co.* 130 Mass. 194; *Neall v. Hill*, 16 Cal. 145; *La Société Française v. 16th Judicial Dist. Ct.* 58 Cal. 495; *Walters v. Anglo-American Mortg. & T. Co.* 50 Fed. Rep. 816; *Blatchford v. Ross*, 54 Barb. 43; *Belmont v. Erie R. Co.* 52 Barb. 637; *Waterbury v. Merchants' U. Exp. Co.* 50 Barb. 157; *Howe v. Deuel*, 48 Barb. 504; *Bangs v. McIntosh*, 23 Barb. 591; *Baker v. Backus*, 83 Ill. 79; *Mason v. Equitable League Sup. Ct.* 77 Md. 483; *Hamilton v. Accessory Transit Co.* 3 Abb. Pr. 255; *Brierfield Iron Works v.*

tion the general rule is that the court which first makes an order for the appointment of a receiver will be entitled to administer the estate.¹

Foster, 54 Ala. 622; *Concease v. Dimock*, 22 Fed. Rep. 573; *Hand v. Dexter*, 41 Ga. 454.

"The basic principle" says Mr. Spelling (Priv. Corp. vol. II, § 842), "of the rule which denies a court of equity the authority to appoint a receiver of a corporation without a statute conferring it under circumstances which would warrant the appointment of one in the case of an individual is that such courts in administering relief may not proceed contrary to a positive rule of law. Now the responsibility of a corporation for abuse of its franchise is on the state, and a judgment of forfeiture, which is one form of dissolution, cannot be rendered at law at the suit of an individual; nor can the same be done in substance in equity by putting an end to all its operations, taking all its property into possession and its motive power away, and making distribution, leaving nothing but an empty name."

As to the want of power to appoint a receiver over a corporation in the absence of a statute, see *Fischer v. San Francisco Sup. Ct.* 2 Am. & Eng. Corp. Cas. N. S. 339.

What is termed jurisdiction as used in this connection has reference to the power to do a judicial act. *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 409; *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 49 Fed. Rep. 608, 15 L. R. A. 109; *Merchants' & P. Nat. Bank v. Masonic Hall*, 63 Ga. 549; *Leadville Coal Co. v. McCreery*, 141 U. S. 475, 35 L. ed. 824.

This rule is founded upon the principle that the appointment of a receiver is in the nature of an equitable

execution. *Davis v. Gray*, 83 U. S. 16 Wall. 208, 21 L. ed. 447; *Beverley v. Brooke*, 4 Gratt. 187; *Hunt v. Wolfe*, 2 Daly, 803.

As to the want of inherent power of a court of equity to dissolve a corporation and appoint a receiver of its property, see *Verplanck v. Mercantile Ins. Co.* 2 Paige, 452; *Bank Comrs. v. Bank of Buffalo*, 6 Paige, 497; *Waterbury v. Merchants' & U. Exp. Co.* 50 Barb. 167; *Robertson v. Bullions*, 11 N. Y. 252; *Howe v. Deuel*, 43 Barb. 504; *Belmont v. Erie R. Co.* 52 Barb. 665; *Slee v. Bloom*, 5 Johns. Ch. 379; *Van Pelt v. United States Metallic Spring B. & S. H. Co.* 18 Abb. Pr. N. S. 381; *Neall v. Hill*, 16 Cal. 150; *Bayless v. Orne*, 1 Freem. Ch. (Miss.) 172; *French v. Gifford*, 30 Iowa, 153; *Atty. Gen. v. Bank of Michigan*, Harr. Ch. 315; *State v. Merchants' Ins. & T. Co.* 8 Humph. 252; *Baker v. Backus*, 32 Ill. 79; *Fountain Ferry Turnp. Road Co. v. Jewell*, 8 B. Mon. 142; *La Société Française v. 15th Judicial Dist. Ct.* 53 Cal. 495.

Where a case is pending in one court in the matter of injunction another court may properly entertain jurisdiction to appoint a receiver. *San Antonio & G. S. R. Co. v. Davis*, 2 Am. & Eng. Corp. Cas. N. S. 374.

The appointment being discretionary it is not a right of course upon the establishment of insolvency of the corporation. *McGeorge v. Big Stone Gap Improv. Co.* 57 Fed. Rep. 262.

The president of a corporation has no power to consent to the appointment of a receiver. *Walters v. Anglo-American Mortg. & T. Co.* 50 Fed. Rep. 316.

¹ When jurisdiction is obtained it

§ 221. Statutory power.

In England, and in most of the states of this country, the power of the courts of chancery over the affairs of corporations has been enlarged, in some instances even to the extent of winding up the corporations, and distributing their assets, and in nearly all cases express power is given to the courts to appoint receivers as a necessary requisite to the due and proper exercise of the enlarged duties and extraordinary powers conferred. These statutory powers are by no means uniform throughout this country, and for this reason there is lack of harmony, in some cases, in the decisions that have been based thereon, yet, as a general rule, the law of receivership in its general sense is applicable to receiverships over corporations. The jurisdiction being statutory, there ought in all cases to be found express authority for exercising the power of appointment of a receiver.¹ Courts

will be retained to the exclusion of other courts. *O'Mahoney v. Belmont*, 62 N. Y. 133; *Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322; *Farnsworth v. Western U. Teleg. Co.* 25 N. Y. S. R. 398; *Safford v. People*, 85 Ill. 558; *State v. Miller*, 54 Kan. 244; *Port Royal & A. R. Co. v. King*, 93 Ga. 63, 24 L. R. A. 730; *May v. Printup*, 59 Ga. 129; *Ft. Wayne, M. & C. R. Co. v. Mellett*, 92 Ind. 535; *Ohio & M. R. Co. v. Fitch*, 20 Ind. 496; *Young v. Rollins*, 85 N. C. 485; *Texas Trunk R. Co. v. State*, 83 Tex. 1; *State, Merriam, v. Ross*, 122 Mo. 462, 23 L. R. A. 534; *Minchin v. Second Nat. Bank*, 36 N. J. Eq. 436; *Milwaukee & St. P. R. Co. v. Milwaukee & M. R. Co.* 20 Wis. 165; *Gelpcke v. Milwaukee & H. R. Co.* 11 Wis. 454; *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660; *Jerome v. McCarter*, 94 U. S. 737, 24 L. ed. 188; *Chittenden v. Brewster*, 69 U. S. 2 Wall. 191, 17 L. ed. 889; *Hatch v. Bancroft-Thompson Co.* 67 Fed. Rep. 802; *Adams v. Mercantile Trust Co.* 66 Fed. Rep. 617; *Central Trust Co. v.*

Chattanooga, R. & C. R. Co. 62 Fed. Rep. 950; *Ames v. Union P. R. Co.* 60 Fed. Rep. 966; *Central Trust Co. v. South Atlantic & O. R. Co.* 57 Fed. Rep. 8; *Reinach v. Atlantic & G. W. R. Co.* 58 Fed. Rep. 33; *Howlett v. Central Carolina Land & Improv. Co.* 56 Fed. Rep. 161; *Carey v. Houston & T. O. R. Co.* 52 Fed. Rep. 671; *Liggett v. Glenn*, 51 Fed. Rep. 381; *Central Nat. Bank v. Hazard*, 49 Fed. Rep. 293; *Lake Superior Iron Co. v. Brown*, 44 Fed. Rep. 539; *Young v. Montgomery & E. R. Co.* 2 Woods, 606; *Western U. Teleg. Co. v. Atlantic & P. Teleg. Co.* 7 Biss. 367; *Gaylord v. Ft. Wayne, M. & C. R. Co.* 6 Biss. 286; *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.* 6 Biss. 197; *Conkling v. Butler*, 4 Biss. 22; *Bill v. New Albany, etc. R. Co.* 2 Biss. 390; *Judd v. Bankers' & M. Teleg. Co.* 24 Blatchf. 420.

¹ Where a bill is filed by minority stockholders of a beneficial association alleging fraud, mismanagement, etc. on the part of the corporate authorities, it may be a case for the annulment of the charter by the legislature, or for proceeding against it as provided

are not inclined to extend these statutory powers by implication, first, by reason of the power being in derogation of the ordinary chancery jurisdiction and, second, by reason of the consequences following the exercise of such power.* And while the courts are

by the corporation laws, but the court independent of the statute has no power to dissolve the corporation or forfeit its charter or correct any supposed abuse or misuse of corporate powers. *Mason v. Equitable League Sup. Ct.* 77 Md. 488; *Goodman v. Jedidjah Lodge No. 7, I. O. of B. B.* 67 Md. 117. If the officers of a corporation should be guilty of misconduct, fraud, or mismanagement, a court of equity has full power to restrain and enjoin them. But it will not take away the rights of the shareholder either by dissolving the corporation or placing its affairs in the hands of a receiver. *Mason v. Equitable League Sup. Ct. supra*; *Baltimore & O. R. Co. v. Cannon*, 72 Md. 498; *La Société Française v. 15th Judicial Dist. Ct.* 58 Cal. 498. As to the inefficient power of courts of equity to appoint receivers in the absence of statutory authority, see *Baker v. Louisiana Portable R. Co.* 84 La. Ann. 754 (criticised and limited in 85 La. Ann. 193); *French v. Gifford*, 80 Iowa, 148; *Hedges v. Paquett*, 3 Or. 77; *United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 478.

But courts have power to appoint receivers to wind up the affairs of insolvent corporations, if there is no other person provided by law to effect such liquidation, whenever necessary to preserve the interests of all concerned. *Stark v. Burke*, 5 La. Ann. 740; *Citizens' Bank v. Levee Steam Cotton Press Co.* 7 La. Ann. 286. But see *Baker v. Louisiana Portable R. Co.* 84 La. Ann. 754.

A court of equity has power to appoint a receiver of a corporation with-

out statutory authority (*Ford v. Kansas City & I. S. L. R. Co.* 52 Mo. App. 489; *Thompson v. Greeley*, 107 Mo. 577); or constitutional authority, *Baker v. Louisiana Portable R. Co.* 84 La. Ann. 754. But see *Com. v. Order of Vesta*, 156 Pa. 581.

Casualty insurance companies are not within N. Y. Laws 1892, chap. 690, § 76, providing that if any "such depositing corporation" shall appear to be in such a condition as to render the issuing of "additional policies and annuity bonds" by it injurious, a receiver of its assets may be appointed who shall take possession thereof, including the securities deposited in the insurance department. *People v. American Steam Boiler Ins. Co.* 147 N. Y. 25.

A decree adjudging a corporation guilty of usurping franchises, rights, and privileges other than those granted by its charter, does not dissolve the corporation so as to give a court jurisdiction to appoint a receiver under Cal. Code Civ. Proc. § 565. *Yore v. San Francisco Super. Ct.* 108 Cal. 431.

¹*Bangs v. McIntosh*, 23 Barb. 591; *Davis v. United States Electric Power & L. Co.* 77 Md. 85; *Oakley v. Paterson Bank*, 2 N. J. Eq. 178; *Re Pyrolusite Manganese Co.* 29 Hun, 429; *People v. Washington Ice Co.* 18 Abb. Pr. 382; *Morgan v. New York & A. R. Co.* 10 Paige, 290; *Rochester v. Bronson*, 41 How. Pr. 78; *People v. Mutual Trust Fund L. Asso.* 21 Abb. N. C. 279; *Lehigh Coal & Nav. Co. v. Central Railroad*, 48 Hun, 546.

As a general rule courts have no power to appoint receivers of corpora-

careful to see that the statutes are strictly followed and not extended beyond their terms, they also require the allegations of the bill or petition, or the affidavits in support thereof, to be specific and definite and not couched in general terms.¹ The decisions based upon statutes, and embodying statutory constructions and applications, are not, as a rule, made use of in this work except where they are of general importance and application, a very large number of the statutes having been repealed or modified and the decisions thereby rendered useless.²

§ 222. Exercise of power discretionary.

The power to appoint receivers is, in all cases, discretionary, and has been held to be especially so in the case of corporations. This discretionary power is peculiarly appropriate in its application to receiverships over corporations; owing to the fact that in this class of cases disputes arise over the management of corporations, between the managing authorities and the shareholders

tions except by statutory authority. *La Société Française v. 15th Judicial Dist. Ct.* 58 Cal. 495; *Waterbury v. Merchants' U. Exp. Co.* 50 Barb. 157; *Neall v. Hill*, 16 Cal. 145; *Belmont v. Erie R. Co.* 52 Barb. 637.

¹*Rathbuns v. Parkersburg Gas Co.* 31 W. Va. 798; *Fort Payne Furnace Co. v. Fort Payne Coal & I. Co.* 96 Ala. 472; *Baker v. Backus*, 82 Ill. 79.

²A few statutory cases having more or less bearing upon the enlarged equity jurisdiction over the appointment of receivers of corporations are as follows: *Galwey v. United States Steam Sugar Ref. Co.* 36 Barb. 286; *Atty. Gen. v. Bank of Columbia*, 1 Paige, 511; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438; *Ward v. Sea Ins. Co.* 7 Paige, 294; *United States Trust Co. v. New York, W. S. & B. R. Co.* 35 Hun, 841; *King v. Barnes*, 51 Hun, 550; *Smith v. Danzig*, 64 How. Pr. 320; *People, Atty. Gen., v. Security L. Ins. Co.* 71 N. Y. 222; *United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 478; *Olmsted v.*

Rochester & P. R. Co. 106 N. Y. 678; *Wærishoffer v. North River Const. Co.* 6 N. Y. Civ. Proc. 113; *Oakley v. Paterson Bank*, 2 N. J. Eq. 173; *Parsons v. Monroe Mfg. Co.* 4 N. J. Eq. 187; *Brundred v. Paterson Mach. Co.* 4 N. J. Eq. 294; *Hager v. Stevens*, 6 N. J. Eq. 374; *Nichols v. Perry Patent Arms Co.* 11 N. J. Eq. 126; *American Ice Mach. Co. v. Paterson Steam Fire Engine & Mach. Co.* 22 N. J. Eq. 72; *Van Wagoner v. Paterson Gaslight Co.* 28 N. J. L. 292; *Baker v. Backus*, 82 Ill. 79; *Hewett v. Adams*, 54 Me. 206; *Fay v. Erie & K. R. Bank*, Harr. Ch. 194; *Stark v. Burke*, 5 La. Ann. 740; *Re Jackson Marine Ins. Co.* 4 Sandf. Ch. 559; *Conro v. Gray*, 4 How. Pr. 166; *St. Louis & S. Coal & Min. Co. v. Edwards*, 103 Ill. 472; *Streit v. Citizens' F. Ins. Co.* 29 N. J. Eq. 21; *Re Empire City Bank*, 10 How. Pr. 498.

Statutes are enforced with caution and strictly construed. *Oakley v. Paterson Bank*, 2 N. J. Eq. 173; *Bangs v. McIntosh*, 28 Barb. 591; *Re Pyrolusite Manganese Co.* 29 Hun, 429.

interested therein, and not unfrequently attempts are made to wrest from the legally constituted authorities the power vested in them upon grounds untenable in matters of partnership, or other cases similar in character. Besides, in corporate receiverships, as a rule, the interests of parties are exceedingly varied and not unfrequently conflicting, and the results of the appointment operate, usually, in the complete suspension and, in the end, absolute extinction of the corporate functions. It is judicial caution which the court is required to exercise in the class of cases rather than judicial discretion. The court must be satisfied from all the circumstances that there is a necessity for the appointment, and this must be based upon a well-grounded apprehension of impending danger established by proof, and be coupled with further proof that the plaintiff making the application has either a title to a lien upon or an interest in the property over which a receiver is asked to be placed.¹ In the discretion of the court it may, as a condition to the appointment of a receiver of railroad property in a foreclosure proceeding, impose terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable.²

¹ *McGeorge v. Big Stone Gap Improv. Co.* 57 Fed. Rep. 262; *Union Trust Co. v. St. Louis, I. M. & S. R. Co.* 4 Dill. 114; *American Biscuit & Mfg. Co. v. Klotz*, 44 Fed. Rep. 721; *Sage v. Memphis & L. R. R. Co.* 125 U. S. 861, 31 L. ed. 694; *Simmons Hardware Co. v. Waibel*, 1 S. D. 488. Lord Eldon in *Lloyd v. Passingham*, 16 Ves. Jr. 59, said: "The court interposes by appointing a receiver against the legal title with reluctance." Cf. *Verplank v. Cuines*, 1 Johns. Ch. 58; *Morrison v. Buckner*, Hempst. 442; *Myers v. Estell*, 48 Miss. 372.

In *Original Vienna Bakery, O. & N. Co. v. Heissler*, 60 Ill. App. 406, it is held that receivers are not appointed as a punishment for past dereliction, nor because of past dangers, but be-

cause of present conditions and well-founded apprehensions of the future; and that in the case of a going concern extraordinary circumstances must exist to justify the appointment. Cf. *Watkins v. National Bank*, 51 Kan. 254; *American Biscuit & Mfg. Co. v. Klotz*, 44 Fed. Rep. 721; *Simmons Hardware Co. v. Waibel*, 1 S. D. 488; *Baltimore & O. R. Co. v. Cannon*, 72 Md. 493; *Mercantile Trust Co. v. Aetna Iron Works*, 4 Ohio C. C. 579; *Mays v. Rose*, Freem. Ch. (Miss.) 708; *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 83.

² *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 839; *Mittenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488;

§ 223. Power to appoint, limitation of.

The limitation of the power of courts of equity to appoint receivers over corporations, in the absence of statutory authority, is not applicable of course to mortgage foreclosure cases, or proceedings under creditors' bills and supplementary actions. In this class of actions the power is substantially identical with that exercised in case of natural persons. The limitation of power as applied to courts of equity in matters of receivership over corporations lies in the fact that the dissolution of corporations and the forfeiture of their franchises are essentially legislative functions, and, where delegated to the judicial branch of government, are

Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co. 58 Fed. Rep. 183; *Milwaukee & M. R. Co. v. Howard*, 181 U. S. Appx. lxxxI, 18 L. ed. 252; *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694. Mr. Justice Harlan in the last-named case says: "Whether a receiver shall be appointed is always a matter of discretion to be exercised sparingly and with great caution in the case of quasi-public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises."

In *Fosdick v. Schall*, *supra*, Mr. Chief Justice Waite says: "But if he (the plaintiff) calls upon the court of chancery to put forth its extraordinary powers and grant him purely equitable relief he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mould his order that, while favoring one, injustice is not done to another. If this cannot be accomplished the application should ordinarily be denied." While the doctrine announced in this case has been criticised, and perhaps

justly so from a strictly legal standpoint, yet in its application to railway receiverships, if not too broadly extended, it is to be sustained on equitable grounds.

While the appointment of a receiver is discretionary, a receiver will not be appointed to take the property of a corporation and its management out of the hands of its board of directors if full relief can be given by injunction. *United Electric Secur. Co. v. Louisiana Electric Light Co.* 68 Fed. Rep. 673.

It must appear that loss will occur if a receiver is not appointed. *McGeorge v. Big Stone Gap Improv. Co.* 57 Fed. Rep. 262. Cf. as to discretion of the court, *Rider v. Bagley*, 84 N. Y. 461; *Milwaukee & M. R. Co. v. Soutter*, 69 U. S. 2 Wall. 510, 17 L. ed. 900; *Myers v. Estell*, 48 Miss. 372; *Lowell v. Doe*, 44 Minn. 144; *Cone v. Paults*, 12 Heisk. 506; *Sales v. Lusk*, 60 Wis. 490; *Jacobs v. Gibson*, 9 Neb. 380.

The appointment of a receiver of an insolvent railroad corporation pending an action to foreclose a trust deed securing bonds is within the discretion of the trial court, although there are issues involved affecting the validity of the bonds. *Childress v. State Trust Co.* (Tex. Civ. App.) 82 S. W. 380.

lodged with the common-law courts as a rule to be enforced through common-law actions. Therefore, until a forfeiture has been had in the proper forum, courts of equity are exceedingly slow in taking from the corporate authorities—the creations of legislative will—the property of the corporation, the management of its business, and the distribution of its assets, and thereby accomplish indirectly that which the court could not do directly. And while it may be true from a strictly legal standpoint that the appointment of a receiver over a corporation does not *ipso facto* destroy its legal entity yet its vitality, is gone and, for all practical purposes, thereafter its existence is only in name.

§ 224. **Application, by whom made.**

(a) It frequently becomes necessary to determine by whom the application shall be made. Thus in an action by certain stockholders, in behalf of themselves and all other stockholders not joined as defendants, alleging fraud by certain officers of the company whereby the corporation has been damaged, the corporation itself being made a defendant, the following rules have been established: (1) That ordinarily, at law, no action can be sustained for such grievances as misconduct of officers except by the corporation itself in its name and by its authority; (2) that as a rule the same principles apply in equity; (3) that in a proceeding in equity, to justify a departure from this principle and permit a suit by stockholders for alleged misconduct of officers the bill must show that suitable redress cannot be attained by an action in the name of the corporation. And while there is not entire unanimity in the authorities as to the efforts necessary to be made to induce the corporation to act, it may be stated, in general, that where the stockholder has no other control over the corporate business than by means of an annual election of officers, such officers represent the corporation for all purposes, and a refusal by them to take proper action for the protection of its interests, or to allow the use of the corporate name for that purpose, ought to justify a proceeding by the stockholders individually. No formal application need be alleged and shown if it sufficiently appears that such application would be unavailing, as when the alleged wrong is on the part of the directors. In such a case the application would be

an idle formality and equity will dispense with it.¹ A mere creditor at large has no power to file a bill for the appointment

¹*Brewer v. Boston Theatre Proprs.* 104 Mass. 378; *Greaves v. Gouge*, 69 N. Y. 154; *Roman v. Woolfolk*, 98 Ala. 219; *Merchants & P. Line v. Waganer*, 71 Ala. 581; *O'Brien v. Chicago, R. I. & P. R. Co.* 53 Barb. 568; *Tuscaloosa Mfg. Co. v. Coa*, 68 Ala. 71; *Dunphy v. Traveller Newspaper Assn.* 146 Mass. 495; *Fratt v. Jewett*, 9 Gray, 84. After a full and elaborate examination of the authorities in England and in this country Mr. Justice Miller, in *Hawes v. Contra Costa Water Co.* ("Hawes v. Oakland"), 104 U. S. 450, 26 L. ed. 828, lays down the following propositions as established: "We understand that doctrine to be that to enable a stockholder, in a corporation, to sustain in a court of equity in his own name a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as to the foundation of the suit: (1) Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the power conferred on them by their charter or some other source of organization; (2) or such a fraudulent transaction completed or contemplated by the acting managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interest of the other shareholders; (3) or where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself, or of the rights of the other shareholders; (4) or where the majority of the shareholders themselves are oppressively and illegally pursuing a course in the

name of the corporation which is in violation of the right of the other shareholders and which can only be restrained by a court of equity." Cf. *Supreme Sitting, O. of I. H. v. Baker*, 184 Ind. 298, 20 L. R. A. 210; *Brewer v. Boston Theatre Proprs.* 104 Mass. 378; *Gragory v. Patchett*, 83 Beav. 595; *March v. Eastern R. Co.* 40 N. H. 567; *Ervin v. Oregon R. & Nav. Co.* 27 Fed. Rep. 625; *Allen v. Curtis*, 26 Conn. 456; *Hersey v. Veazie*, 24 Me. 9; *Roman v. Woolfolk*, 98 Ala. 219.

A court of equity may, at the instance of a stockholder, and if the company itself refuses to move, lawfully entertain a bill to depose or to restrain the officers or directors of a corporation when it appears that in their capacity as agents or trustees of the stockholders they have committed or are about to commit acts that are tantamount to a breach of trust, whether such acts consist of fraudulent dealings with the corporate property or funds, or whether they consist in engaging the corporation in enterprises that are beyond the scope of its chartered powers. In more general phrase it is sometimes said that a court of chancery may grant equitable relief against a corporation at the suit of an individual, whenever a sufficient cause of relief is shown upon ordinary principles of equity jurisprudence. *Republican Mountain Silver Mines v. Brown*, 58 Fed. Rep. 644, 24 L. R. A. 776; *Dodge v. Woolsey*, 59 U. S. 18 How. 331, 15 L. ed. 401; *Zabriskie v. Cleveland, C. & C. R. Co.* 64 U. S. 23 How. 381, 16 L. ed. 488; *Peabody v. Flint*, 6 Allen, 52; *March v. Eastern R. Co.* 40 N. H. 548; *Robinson v. Smith*, 8 Paige, 22.

A suit by members of an unincorporated mutual association for a receiver, etc., should be brought against the other members, not against the executive officers alone. *Montgomery v. Knox*, 20 Fla. 372.

In New York a receiver of the property of a corporation cannot be appointed on the application of a creditor at large. *Lehigh Coal & Nav. Co. v. Central Railroad*, 43 Hun, 546. But see, in the case of a stockholder, *Woerishoffer v. North River Const. Co.* 99 N. Y. 398.

A court of equity, as such, in the absence of statutory authority, has no power to appoint a receiver over a corporation at the suit of a stockholder. *La Société Française v. 15th Judicial Dist. Ct.* 53 Cal. 457; *Neall v. Hill*, 16 Cal. 145.

The appointment of a receiver on application of a stockholder will not be denied on the ground that the corporation has ceased to exist and the property is held by joint ownership, merely because the shares have passed into the hands of a less number of persons than the law requires for stockholders, and the offices of the company have become vacant, while an administrator of the only other stockholder has taken possession of the corporate property. *Re Belton*, 47 La. Ann. 1614, 30 L. R. A. 648.

The court will not appoint a receiver on the application of a stockholder alleging mismanagement, fraud, and collusion for the reason that in effect it would be a dissolution (*Waterbury v. Merchants' W. Exp. Co.* 50 Barb. 157); except where the corporate property is abandoned, or where there is no one to take charge of its affairs (*Lawrence v. Greenwich F. Ins. Co.* 1 Paige, 587); or where it had committed acts *ultra vires* (*Leavitt v. Yates*, 4 Edw. Ch. 173); or where its officers have committed a

breach of trust (*Evans v. Cocentry*, 5 De G. M. & G. 911); or where its franchises are abandoned (*Buck v. Piedmont & A. L. Ins. Co.* 4 Fed. Rep. 849); or where its property has been mortgaged and there is a default. *United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 478.

In a creditor's proceeding where the common-law remedies are inadequate, a receiver may be appointed. *Covington Draw Bridge Co. v. Shephard*, 62 U. S. 21 How. 112, 16 L. ed. 38; *Dambman v. Empire Mill*, 12 Barb. 341; *Galwey v. United States Steam Sugar Ref. Co.* 13 Abb. Pr. 211; *Adler v. Milwaukee P. B. Mfg. Co.* 13 Wis. 57; *Barclay v. Quick Silver Min. Co.* 9 Abb. Pr. N. S. 283; *Morgan v. New York & A. R. Co.* 10 Paige, 290.

As a rule the application for a receiver can only be made by a stockholder or creditor who has an interest in the distribution of the assets, in the absence of a statute. *Western N. C. R. Co. v. Rollins*, 82 N. C. 523.

It cannot be made by one who has parted with his interest in the stock. *Smith v. Wells*, 20 How. Pr. 158; *Hill v. Nautilus Ins. Co.* 4 Sandf. Ch. 577.

In the absence of statutory power the state can have no interest in the appointment of a receiver. *Havemeyer v. San Francisco Super. Ct.* 84 Cal. 327, 10 L. R. A. 627; *Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 340. See *United States v. Church of Jesus Christ of L. D. S.* 5 Utah, 361.

A stockholder of a corporation is not entitled to have a receiver appointed under Tex. Rev. Civ. Stat. art. 1461, §§ 3, 4, providing for such appointment in all cases in which receivers have been previously appointed by the usages of courts of equity, where his complaint does not show that he has tried to induce the directors or the shareholders as a body to bring the action, or that he could

of a receiver of a domestic or foreign corporation,¹ but a stockholder has such right.² In nearly all the states the statute has provided in whose name the application shall be made, and the manner of proceeding.

In matters relating to corporations application for a receiver may also be made: (b) by a surety for the corporation;³ (c) by minority stockholders.⁴

not have procured them to do so, or that it was not reasonable to require him to do so. *New Birmingham Iron & L. Co. v. Blevins* (Tex. Civ. App.) 34 S. W. 828.

An action by a stockholder of a corporation against the directors or officers, for the appointment of a receiver, is not within Tex. Rev. Civ. Stat. art. 1461, § 1, authorizing the appointment of a receiver in suits between joint owners of property where it appears in danger of being lost, as §§ 3, 4, provide specifically as to the circumstances under which a receiver may be appointed for a corporation. *New Birmingham Iron & L. Co. v. Blevins, supra*.

A receiver may be appointed, in the discretion of the court, to apportion the fund and pay it over to the proper parties, in an action by a stockholder of a corporation to recover a fund in which others are equally interested. *Fox v. Hale & N. Silver Min. Co.* (No. 1), 108 Cal. 475.

A receiver of a corporation will not be appointed in a stockholder's suit brought at the instance of and for the benefit of a third person who seeks to force a payment from the corporation for procuring the discontinuance of the proceeding. *O'Connor v. Long Island Traction Co.* 15 Misc. 501.

¹ *Lehigh Coal & Nav. Co. v. Central Railroad*, 43 Hun, 546.

² *Woerishoffer v. North River Const. Co.* 99 N. Y. 398. Cf. *Central R. & Bkg. Co. v. Farmers' Loan & T. Co.*

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56 Fed. Rep. 357; *Re Christian Jensen Co.* 128 N. Y. 550.

³ The application may be on behalf of a surety for the corporation (*Barbour v. National Exch. Bank*, 45 Ohio St. 188); and in such case it is not necessary that the surety has paid the debt. *Adams*, Eq. 270; 1 Story, Eq. Jur. § 327; 2 Story, Eq. Jur. § 849; *Stump v. Rogers*, 1 Ohio, 538; *McConnell v. Scott*, 15 Ohio, 401.

⁴ Or on behalf of a minority stockholder, where it is necessary to prevent fraud and material injury, or destruction. (*Hugh v. McRae*, Chase, Dec. 466; *Cameron v. Havemeyer*, 25 Abb. N.C. 488); or where the majority neglect to elect officers and the franchises are abandoned. *Lawrence v. Greenwich F. Ins. Co.* 1 Paige, 587. But see *Hinckley v. Pfister*, 83 Wis. 64; *Strong v. McCagg*, 55 Wis. 624. Minority stockholders are entitled to a receiver pending the investigation of charges of gross fraud of the majority stockholders. *State, Independent Dist. Teleg. Co. v. Silver Bow County 2d Judicial Dist. Ct.* 15 Mont. 824, 27 L. R. A. 892. But see *Ranger v. Champion Cotton-Press Co.* 52 Fed. Rep. 609.

Where directors are disposing of the property of a corporation as a whole, and are sustained by a majority of the stockholders, in the absence of fraud or a violation of the charter, the court will not appoint a receiver on the application of a minority of the stockholders. *Sewell v. East Cape May Beach Co.* 50 N. J. Eq. 717. And

(d) by the defendant;¹ (e) by the directors;² (f) by judgment creditors;³ (g) but not by the corporation.⁴

see *Chicago & S. E. R. Co. v. Cason*, 133 Ind. 49; *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 182.

A receiver of a corporation will not be appointed at the instance of minority stockholders because its assets are not in proportion to its outstanding stock, where it was over-capitalized at its organization, and the ratio has not materially changed. *Lowe v. Pioneer Threshing Co.* 70 Fed. Rep. 646.

¹Or on the application of the defendant when he seeks some relief against his codefendant. *Henshaw v. Wells*, 9 Humph. 568. See *contra*, *Loddell v. Starr*, 19 N. J. Eq. 159; *Robinson v. Hadley*, 11 Beav. 614.

²Or on the application of the directors (*McIlhenny v. Bins*, 80 Tex. 1), and especially so where the statute empowers others so to do. Mo. Rev. Stat. 1889, § 2513; *Havemeyer v. San Francisco Super. Ct.* 84 Cal. 327.

³Or on the application of a judgment creditor, or one having a lien upon the property (*Lehigh Coal & Nav. Co. v. Central R. Co.* 43 Hun, 546), but not in behalf of a general creditor having no judgment or lien. *McGoldrick v. Slevin*, 43 Ind. 522; *May v. Greenhill*, 80 Ind. 124; *Ades v. Bigler*, 81 N. Y. 349; *Bayaud v. Fellows*, 28 Barb. 451; *Hubbard v. Hubbard*, 14 Md. 356; *Rich v. Levy*, 16 Md. 74; *Johnson v. Furnum*, 56 Ga. 144; *Dodge v. Pyrolusite Manganese Co.* 69 Ga. 665; *Holdrege v. Gwynne*, 18 N. J. Eq. 26; *Bigelow v. Andress*, 31 Ill. 322; *Cain v. Johnson* (Tex. Civ. App.) 33 S. W. 1000; *Virginia, T. & O. Steel & I. Co. v. Wilder*, 88 Va. 942. But see statute in Wisconsin. *Hurlbut v. Marshall*, 62 Wis. 590.

A judgment creditor, after execution returned unsatisfied, may have a

receiver over an insolvent corporation where an assessment on the stockholders is necessary to pay debts. *Cleveland v. Marine Bank*, 17 Wis. 545; *Coleman v. White*, 14 Wis. 700; *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 63; *Ward v. Grinnoldville Mfg. Co.* 16 Conn. 598; *Spear v. Grant*, 16 Mass. 9; *Wood v. Dummer*, 3 Mason, 308; *Bangs v. McIntosh*, 23 Barb. 591. See effect of statute in such case. *Van Glahn v. De Rosset*, 81 N. C. 467.

The appointment of a receiver of a corporation at the instance of a creditor, in an action to recover on a debt, is for the benefit of all creditors, and the party procuring the same cannot have him discharged against the protest of a nonsatisfied creditor, who might be damaged by a discharge. *Lenoir v. Linville Improv. Co.* 117 N. C. 471.

A receiver of a corporation will not be appointed in an action by an unsecured creditor to recover money, although there is manifest danger that the property may be lost or disposed of before he can obtain an execution. *New Birmingham Iron & L. Co. v. Blevins* (Tex. Civ. App.) 34 S. W. 828.

⁴A corporation cannot apply to be put in hands of a receiver. *Kimball v. Goodburn*, 33 Mich. 10.

But the corporation itself has no authority to apply for a receiver and place the corporate property in his custody. *Kimball v. Goodburn*, 33 Mich. 10; *McIlhenny v. Bins*, 80 Tex. 1; *Hugh v. McRae*, Chase, Dec. 466; *Jones v. Bank of Leadville*, 10 Colo. 464; *Atkins v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 161; *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201; *Hinckley v. Pfister*, 33 Wis. 64. But see *Wabash, St. L. & P. R. Co. v. Central*

If the application is based upon a statutory cause then the requirements of such statute must be strictly followed. But it is not necessary in other cases that a receiver shall be prayed for. It is sufficient if it appear by affidavit or petition that a receiver is necessary.¹ The application cannot be made by one who has parted with his interest.²

§ 225. Grounds for appointment.

A receiver of a corporation, upon proper application by a proper party, may be appointed:—

(a) Where for any statutory cause such power is given, as in case of insolvency, fraud, misconduct on the part of the officers, directors, or corporate managers, etc.³

Trust Co. 22 Fed. Rep. 272, 23 Fed. Rep. 863, 23 Fed. Rep. 513; *Central Trust Co. v. Wabash, St. L & P. R. Co.* 29 Fed. Rep. 618; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632; *State, Merriam, v. Ross*, 122 Mo. 435, 23 L. R. A. 534; *Hill v. Western & A. R. Co.* 86 Ga. 284; *American Biscuit Mfg. Co. v. Klotz*, 44 Fed. Rep. 721; *Re Kittanning Ins. Co.* 146 Pa. 102.

The president, in the absence of authority from the directors or stockholders, has no power to consent to the appointment. *Walters v. Anglo-American Mortg. & T. Co.* 50 Fed. Rep. 316.

See valuable article upon "New-Fashioned Receiverships" by Mr. D. H. Chamberlain in *Harvard Law Review*, vol. X., No. 3 (Nov. 1896).

Nor has the court on its own motion power to appoint in the absence of a prayer for that purpose in the bill or answer. *Augusta Ice Mfg. Co. v. Gray*, 60 Ga. 344.

¹*Langdon v. Vermont & C. R. Co.* 54 Vt. 593; *Vermont & C. R. Co. v. Vermont C. R. Co.* 50 Vt. 500; *Bowman v. Bell*, 14 Sim. 392; *Commercial & S. Bank v. Corbett*, 5 Sawy. 172;

Merrill v. Elam, 2 Tenn. Ch. 513; *Henshaw v. Wells*, 9 Humph. 568; *Ladd v. Harvey*, 21 N. H. 514.

²*Smith v. Wells*, 20 How. Pr. 158; *Hill v. Nautilus Ins. Co.* 4 Sandf. Ch. 577.

³*Supreme Sitting, O. of I. H. v. Baker*, 184 Ind. 293, 2 L. R. A. 210; *Zieverink v. Kemper*, 50 Ohio St. 208; *Bacon v. Northwestern Store Co.* 5 Ohio C. C. 289; *Mason v. Westoby*, L. R. 32 Ch. Div. 206 (But see L. R. 42 Ch. Div. 590); *First Nat. Bank v. United States Encaustic Tile Co.* 105 Ind. 227; *Loaisea v. San Francisco Super. Ct.* 85 Cal. 11, 9 L. R. A. 37; *Conroy v. Gray*, 4 How. Pr. 166; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Wayne Pike Co. v. Hammons*, 129 Ind. 368; *Warren v. Fake*, 49 How. Pr. 480; *Featherstone v. Cooke*, L. R. 16 Eq. 301; *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 303; *St. Louis & S. Coal & Min. Co. v. Edwards*, 108 Ill. 472; *Blatchford v. Ross*, 54 Barb. 42; *Re The Mart*, 22 Abb. N. C. 227.

Under the judicature act 1878, § 25, chap. 8, the greatest latitude is given for the appointment of a receiver in England. It authorizes the appointment whenever the court is of the

opinion that it would be "just or convenient," or just *and* convenient as construed by the court. *North London R. Co. v. Great Northern R. Co.* L. R. 11 Q. B. Div. 80.

Under § 25, chap. 32, Revised Statutes of Illinois, it was held that the statute was the sole authority for decreeing the dissolution of a corporation and appointing a receiver; that there was no equity jurisdiction for such purpose. One of the causes for dissolution and the appointment of a receiver specified in the statute was ceasing to do business, leaving debts unpaid, and it appeared that attachments were levied on the company property and the ceasing to do business was a necessary result of the levies, but it was held this was not sufficient cause for dissolution and the appointment of a receiver, and the order of appointment was void. *People, Wright, v. Weigley*, 155 Ill. 491. Cf. as to the construction of the statute, *Wheeler v. Pullman Iron & S. Co.* 143 Ill. 197, 17 L. R. A. 818; *Hunt v. Le Grand Roller Skating Rink Co.* 143 Ill. 118. If the appointment is defective merely the order is only voidable. *State, Hoffman, v. Scarritt*, 128 Mo. 331.

"While the order might have been erroneous, and subject to reversal on appeal, it cannot be collaterally impeached or disregarded. It may be that the showing upon the application was inadequate under the law and practice of the court, yet the court had the power to decide that question, and whether it decided rightly or not is not a question that goes to the jurisdiction of the court over the subject-matter." *Davis v. Shearer*, 90 Wis. 250; *Bangs v. Duckinfield*, 18 N. Y. 595; *Peck v. Beloit School Dist. No. 4*, 21 Wis. 517; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Vermont & C. R. Co. v. Vermont C. R. Co.* 46 Vt. 795.

In *Yore v. San Francisco Super. Ct.* (Cal.) 41 Pac. 411, it was held under Code Civ. Proc. § 565, that where the judgment did not dissolve the corporation, the appointment of a receiver was void.

Under the Wisconsin Statutes (§§ 1968, 2787, 3241, 3247, Sanb. & B. Ann. Stat. §§ 1968, 2787, 3241, 3247), where a corporation is dissolved and a receiver appointed, the effect of the decree is to vest the legal title in the receiver. *American Nat. Bank v. National Ben. & C. Co.* 70 Fed. Rep. 420.

Under the Minnesota Statutes (assignment law of 1876, insolvent law of 1881, Gen. Stat. 1878, chap. 76, § 9) where a general assignment for the benefit of creditors has been made, creditors are not as a matter of right entitled to a receiver to supersede the assignee in the administration of the assets, except for the purpose of enforcing stock liability. *International Trust Co. v. American Loan & T. Co.* (Minn.) 65 N. W. 78; and see *Com. v. Order of Vesta*, 156 Pa. 531. It is also held that a receiver will not be appointed under the Minnesota statutes in the suit of a creditor who has not exhausted his legal remedies, as required by Gen. Stat. 1878, chap. 76, § 9, *Klee v. E. H. Steele Co.* (Minn.) 62 N. W. 399. *Quere*, where it is shown that such remedies would be valueless.

Under the Idaho Statutes (Rev. Stat. §§ 5185-5187), authorizing a dissolution of a corporation upon specific grounds, a corporation may be dissolved on the application of trustees and stockholders and a receiver appointed under § 4329, where such receiver is necessary. *Security Sav. & T. Co. v. Piper* (Idaho) 40 Pac. 144.

Under the bank commissioners' act of 1878 as amended in 1887, it was held that the appointment of a

receiver under the provisions of the Code of Civil Procedure of California, (§§ 187, 564) in a proceeding instituted by the Attorney General under § 11 of the former act was illegal, the bank commissioners' act being silent as to the procedure to be had. The statute authorizing the proceedings against the corporation which were taken being silent as to the appointment of a receiver it cannot be supplemented by the provisions of another statute. *Murray v. American Surety Co.* 2 Am. & Eng. Corp. Cas. N. S. 850. Cf. *Havemeyer v. San Francisco Super. Ct.* 84 Cal. 327, 10 L. R. A. 627; *People's Home Sav. Bank v. San Francisco Super. Ct.* 103 Cal. 27; *State Invest. & Ins. Co. v. San Francisco Super. Ct.* 101 Cal. 135. The state having no interest in either the assets of the corporation or its debts, it has done its whole duty when it has secured a dissolution of the corporation. *Id.* See also *People v. San Francisco Super. Ct.* 100 Cal. 105; *Long v. San Francisco Super. Ct.* 102 Cal. 449; *People v. Buffalo Stone & C. Co.* 131 N. Y. 140, 15 L. R. A. 240. In all special statutory proceedings it is a rule of law that the measure of the power of the court is the statute under which the proceedings are had. *Murray v. American Surety Co.* 2 Am. & Eng. Corp. Cas. N. S. 850; *Smith v. Westerfield*, 88 Cal. 874; *East Tennessee, V. & G. R. Co. v. Southern Teleg. Co.* 112 U. S. 806, 28 L. ed. 746. If the statute provides a method to be pursued, the action of the court in regard thereto, however erroneous, will be conclusive until reversed on appeal, but the judgment of the court where unauthorized by the statute is wholly void. *Dowell v. Applegate*, 152 U. S. 827, 38 L. ed. 463; *United States v. Walker*, 109 U. S. 258, 27 L. ed. 927; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464.

Under the Indiana Statute (Rev. Stat. 1894, § 3485) which requires application for a receiver to be made within three years after the expiration of the charter, it was held that an application after the expiration of the statutory period should be refused. *Hatfield v. Cummings*, 140 Ind. 547. But if the application is in apt time the appointment may be made afterwards. *Id.*

In Alabama a receiver will not be appointed over a corporation on behalf of a creditor, who also owns half of the stock of the company, alleging as grounds that the creditors are pressing for payment, judgments obtained, and liability of levies imminent, likely to produce dismemberment of the company and its business. *Little Warrior Coal Co. v. Hooper* (Ala.) 2 Am. & Eng. Corp. Cas. N. S. 865.

Where the appointment of a receiver and the regulation of proceedings are of statutory origin the statute must be strictly complied with. *Atty. Gen. v. Atlantic Mut. L. Ins. Co.* 77 N. Y. 836; *Chamberlain v. Rochester Seamless Paper Vessel Co.* 7 Hun, 557; and where the receiver is appointed by the Federal court he shall manage and operate according to the requirement of the valid state laws where the property is located. Act of Congress, March 8, 1887, § 2.

A statute providing for the appointment of a receiver in behalf of a judgment creditor who has execution issued and returned no property found, is but a declaration of the law as administered in courts of equity before its passage. *Minkler v. United States Sheep Co.* 4 N. D. 507, 2 Am. & Eng. Corp. Cas. N. S. 868; *Child v. Brace*, 4 Paige, 809; *Taylor v. Bowker*, 111 U. S. 110, 28 L. ed. 868.

Under the Pennsylvania act of April 4, 1872, relative to the dissolution of corporations, the court of com-

(b) Where there is default in the payment of an indebtedness, or the interest thereon, secured by mortgage or trust deed, or other covenant in such trust deed.¹

mon pleas has no jurisdiction to appoint receivers where none of the property of the corporation is within the county, and none of its officers are residents. *Com. v. Order of Vesta*, 156 Pa. 531.

¹*Edwards v. Standard Rolling Stock Syndicate* [1893] 1 Ch. 574; *Wildy v. Mid-Hants R. Co.* 16 Week. Rep. 409; *Makins v. Ibbotson* [1891] 1 Ch. 133; *State Journal Co. v. Commonwealth Co.* 43 Kan. 98; *Van Benthuyzen v. Central N. E. & W. R. Co.* 45 N. Y. S. R. 16; *Hall v. Astoria Veneer Mills & L. Co.* 5 Ry. & Corp. L. J. 412; *Haugan v. Notland*, 51 Minn. 552; *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* 87 Fed. Rep. 286, 8 L. R. A. 90; *Haas v. Chicago Bldg. Soc.* 89 Ill. 498; *Re Pound*, L. R. 42 Ch. Div. 402; *Lowell v. Doe*, 44 Minn. 144; *Stockman v. Wallis*, 30 N. J. Eq. 449; *Chetwood v. Coffin*, 80 N. J. Eq. 450; *Williams v. Noland*, 2 Tenn. Ch. 151; *Mahon v. Crothers*, 28 N. J. Eq. 567; *Des Moines Gas Co. v. West*, 44 Iowa, 23; *Wall Street F. Ins. Co. v. Loud*, 20 How. Pr. 95; *Kerchner v. Fairley*, 80 N. C. 24; *Beecher v. Marquette & P. Rolling Mills Co.* 40 Mich. 307; *Truman v. Redgrave*, L. R. 18 Ch. Div. 547; *Brassey v. New York & N. E. R. Co.* 19 Fed. Rep. 663; *Long Dock Co. v. Mullery*, 12 N. J. Eq. 431; *Strong v. Carlyle Press* [1893] 1 Ch. 268; *American Loan & T. Co. v. Toledo, O. & S. R. Co.* 29 Fed. Rep. 416.

A receiver and manager of the business of a corporation may be appointed in an action by debentureholders to enforce their security, although the principal is not due and interest is not in arrear, where the company consents, and there is evi-

dence that an execution has been levied by a judgment creditor upon the property embraced in the trust deed or mortgage, and that other actions by creditors are pending against the company. *Edwards v. Standard Rolling Stock Syndicate* [1893] 1 Ch. 574; *Wildy v. Mid-Hants R. Co.* 16 Week. Rep. 409; *Makins v. Ibbotson* [1891] 1 Ch. 133.

In *Union Trust Co. v. St. Louis, I. M. & S. R. Co.* 4 Dill. 114, receivership of a railroad was refused, although the company had defaulted in the payment of interest on mortgage bonds, and had refused the demand of the trustees of the bondholders to be put in possession, where there was no proof that loss would result to bondholders by allowing the company to continue in possession.

If the mortgage covers the income and profits, and there is a default in the payment of interest, a receiver may be appointed without proof of insolvency of the corporation, or inadequacy of the security. *Allen v. Dallas & W. R. Co.* 3 Woods, 316; *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 409. And where the income is pledged and the mortgagor is insolvent on foreclosure a receiver will be appointed as of course. *American Bridge Co. v. Heidelberg*, 94 U. S. 793, 24 L. ed. 144; *Des Moines Gas Co. v. West*, 44 Iowa, 23; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 36 Fed. Rep. 221, 1 L. R. A. 397; *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 260.

Insolvency of the company and danger from executions is ground for a receiver. *Re South Carolina R. Co.* [1878] 11 Chicago Legal News, 8;

(c) Where upon application of a stockholder it is shown that the directors and officers of the corporation are mismanaging its affairs, as for their own personal advantage and gain.¹

Sage v. Memphis & L. R. R. Co. 185 U. S. 861, 31 L. ed. 694.

So also where the company is insolvent, with interest in arrears and insufficient security. *Keep v. Michigan L. O. R. Co.* 6 Chicago Legal News, 101; *Lehman v. Tallahassee Mfg. Co.* 64 Ala. 567. And the refusal of the trustee to take possession after default is also a ground. *Warner v. Rising Fawn Iron Co.* 3 Woods, 514; *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 409; *Pennsylvania Co. for Ins. on Lives v. Jacksonville, T. & W. R. Co.* 55 Fed. Rep. 124. But mere default in the payment of corporate bonds is not in itself ground for the appointment of a receiver. *Williams v. Robinson*, 16 Conn. 517.

A receiver will not be appointed as a matter of course, or as a matter of right, but is always in the sound judicial discretion of the court. Fraud, incompetency, preservation of the property, or some other sufficient reason must be given. *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. Rep. 182; *Blair v. St. Louis, H. & K. R. Co.* 20 Fed. Rep. 348. Cf. Cook, Stock & Stockholders, § 852.

See further chapters on Receivership in Mortgage Foreclosures and Receivership in Railway Corporations.

See note 8, page 855.

¹ *Haywood v. Lincoln Lumber Co.* 64 Wis. 689; *Supreme Sittling, O. of I. H. v. Baker*, 184 Ind. 293, 2 L. R. A. 210; *Stevens v. Davidson*, 18 Gratt. 819; *Conro v. Gray*, 4 How. Pr. 166; *Warren v. Fake*, 49 How. Pr. 480; *Blatchford v. Ross*, 54 Barb. 42; *Evans v. Coventry*, 5 DeG. M. & G. 911;

Redmond v. Enfield Mfg. Co. 18 Abb. Pr. N. S. 332; *Wayne Pike Co. v. Hammons*, 129 Ind. 868; *Carter v. Ford Plate Glass Co.* 85 Ind. 180; *Rogers v. Lafayette Agri. Works*, 52 Ind. 296; *Port v. Russell*, 36 Ind. 60; *Michoud v. Girod*, 45 U. S. 4 How. 502, 11 L. ed. 1076; *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 553; *Railway Co. v. Blakie*, 1 Macq. 461; *Davis v. Memphis City R. Co.* 22 Fed. Rep. 883; *Sellers v. Phoenix Iron Co.* 18 Fed. Rep. 20; *Hubbard v. New York, N. E. & W. Invest. Co.* 14 Fed. Rep. 675; *Miner v. Belle Isle Ice Co.* 98 Mich. 97, 17 L. R. A. 412; *Copeland v. Johnson Mfg. Co.* 47 Hun, 235; *Currier v. New York, W. S. & B. R. Co.* 35 Hun, 855; *Jackson v. McLean*, 36 Fed. Rep. 213.

A receivership of a corporation, in an action to prevent mismanagement by the directors, should not be continued where the corporation is not insolvent and the offending directors have retired from office. *Halpin v. Mutual Brew. Co.* 91 Hun, 320.

When the company is insolvent and has fraudulently disposed of its property, the appointment is proper. *Nichols v. Perry Patent Arm Co.* 11 N. J. Eq. 126; *Atty. Gen. v. Bank of Columbia*, 1 Paige, 511; *Howard v. Whitman*, 29 Ind. 557.

Irregular acts of corporate officers in the absence of fraud will not justify the appointment. *Hardee v. Sunset Oil Co.* 56 Fed. Rep. 51.

A receiver will not be appointed over a corporation if relief from mismanagement can be had by injunction. *United Electric Secur. Co. v. Louisiana Electric-Light Co.* 68 Fed. Rep. 673.

(d) Where the corporation is insolvent and without assets, and the officers have ceased to act.¹

In *Haywood v. Lincoln Lumber Co.* 64 Wis. 639, it is held: (1) That the directors of the corporation are trustees of all the property belonging to it and have no right to secure to themselves any preference or advantage. *Marr v. Bank of West Tennessee*, 4 Coldw. 471, 484; *Koehler v. Black River Falls Iron Co.* 67 U. S. 2 Black, 715, 17 L. ed. 839; *Curran v. Arkansas*, 56 U. S. 15 How. 306, 14 L. ed. 706; *Richards v. New Hampshire Ins. Co.* 43 N. H. 263; *Bradley v. Farwell*, Holmes, 433; *Drury v. Milwaukee & S. R. Co.* 74 U. S. 7 Wall. 299, 19 L. ed. 40; *Paine v. Lake Erie & L. R. Co.* 31 Ind. 353; *Gaslight Improv. Co. v. Terrell*, L. R. 10 Eq. Cas. 168; *Smith v. Lansing*, 22 N. Y. 521; *Whitwell v. Warner*, 20 Vt. 425; *Buell v. Buckingham*, 16 Iowa, 284; *Hopkins' Appeal*, 90 Pa. 69. (2) Nor to take a mortgage to themselves for their own benefit to the injury of others in equal right. *Corbett v. Woodward*, 5 Sawy. 403; *Koehler v. Black River Falls Iron Co.* 67 U. S. 2 Black, 715, 17 L. ed. 839; *Hoyle v. Plattsburg & M. R. Co.* 54 N. Y. 314; *European & N. A. R. Co. v. Poor*, 59 Me. 277; *Butts v. Wood*, 38 Barb. 181; *Scott v. Depeyster*, 1 Edw. Ch. 513; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438; *Great Luxembourg & R. Co. v. Magnay*, 25 Beav. 586; *Cook v. Berlin Woolen Mill Co.* 43 Wis. 434; *Pickett v. School Dist.* 25 Wis. 553; *Re Taylor Orphan Asylum*, 36 Wis. 553.

In *United Electric Secur. Co. v. Louisiana Electric Light Co.* 68 Fed. Rep. 673, it is held that a court will not take the management of a corporation out of the hands of its directors on the ground of mismanagement if full relief can be obtained by injunction.

Failure to elect officers, or want of sufficient officers occasioned by death, or the destruction of the corporate property by fire will not of themselves work a dissolution. But where there is a refusal or neglect to replace the necessary officers, and the administrator of a deceased officer takes possession of the corporate property, a receiver may be appointed. *Re Belton*, 47 La. Ann. 1614, 30 L. R. A. 648.

¹*Ford v. Kansas City & I. Short Line R. Co.* 53 Mo. App. 439.

The courts in New York have no power either by statute or under their inherent jurisdiction as courts of chancery, to appoint a receiver of a corporation upon a petition showing sufficient assets to meet all liabilities eventually, but that some of the creditors whose claims have matured threaten suit, and that the institution of such suits would be prejudicial to the interests of creditors whose claims are not due. *Re Atlas Iron Const. Co.* 71 N. Y. S. R. 801.

The appointment of a temporary receiver of the property of a corporation in a proceeding for its voluntary dissolution, under N. Y. Code Civ. Proc. § 2428, making such appointment dependent upon the insolvency of the corporation, is not authorized, where the schedule of the assets and liabilities, verified by the petitioners, shows a surplus of the assets; and an injunction against creditors is likewise without authority upon such a showing. *Re Hitchcock Mfg. Co.* 1 App. Div. 164.

A creditor who obtains the property of a domestic corporation by purchase under execution upon a judgment recovered in another state, in violation of N. Y. Laws 1892, chap. 688, ren-

(e) Where the corporation has been dissolved and it is necessary to preserve and distribute the property or its proceeds.¹

(f) Where the charter of a corporation has been repealed by a constitutional provision.²

(g) Where the corporation has been declared bankrupt, and the purchaser at the assignee's sale is in possession receiving the income which the mortgagee is entitled to.³

(h) Where it appears that the holders of a majority of the stock of a corporation neglect to elect officers, and there is no one

dering invalid any judgment suffered by an insolvent corporation with intent to prefer a particular creditor, will be held as a trustee of the property in favor of a receiver of the corporation, where the court in New York has acquired jurisdiction of his person. *Olney v. Baird*, 15 Misc. 335.

Mere disagreement between the directors and stockholders as to the management of a corporation, in the absence of fraud, does not authorize the appointment of a receiver. *Little Warrior Coal Co. v. Hooper* (Ala.) 2 Am. & Eng. Corp. Cas. N. S. 365.

Where the insolvency of the company is established and the application is by a creditor, a receiver may be appointed. *San Antonio & G. S. R. Co. v. Davis*, (Tex. Civ. App.) 2 Am. & Eng. Corp. Cas. N. S. 374.

¹*Havemeyer v. San Francisco Super. Ct.* 84 Cal. 327, 10 L. R. A. 627; *First Nat. Bank v. United States Encaustic Tile Co.* 105 Ind. 227; *People, Wright, v. Weigley*, 155 Ill. 491; *Yore v. San Francisco Super. Ct.* 108 Cal. 431; *City Water Co. v. State*, 88 Tex. 600; See further ¶ a, this section; and 2 Am. & Eng. Corp. Cas. N. S. 240, *et seq.*

The court will not decree a dissolution and appoint a receiver if the corporation is not a defendant. *Graven-*

stine's Appeal, 49 Pa. 310; *Mickles v. Rochester City Bank*, 11 Paige, 118.

On a voluntary dissolution the receiver is vested with the corporate interests except the power to do business. *Chicago Mut. L. Indem. Assn. v. Hunt*, 127 Ill. 257, 2 L. R. A. 549.

The schedule of assets and liabilities annexed to a petition for the voluntary dissolution of a corporation which shows a surplus of assets cannot be amended after the appointment of a receiver which is authorized only when the corporation is insolvent, so as to show a deficiency of assets, under N. Y. Code Civ. Proc. § 2427, providing for the amendment of the schedules before final order by the insertion of additional items, or by making the statement or inventory fuller and in greater detail. *Re Hitchcock Mfg. Co.* 1 App. Div. 164.

A receiver should not be appointed in proceedings to dissolve a corporation, for the sole purpose of preventing a creditor from resorting to the legal process against it to which he is entitled. *Ward v. Segar*, 60 Ill. App. 424.

²*Putnam v. Ruch*, 54 Fed. Rep. 216; *Curran v. Arkansas*, 56 U. S. 15 How. 304, 14 L. ed. 705.

³*Kelly v. Alabama & C. R. Co.* 58 Ala. 489. Cf. *Ex parte Brown*, 58 Ala. 536.

authorized to conduct the affairs of the corporation, and preserve the corporate property.¹

(i) Where a judgment has been rendered against the corporation and it is necessary to collect unpaid subscriptions to the capital stock.²

(j) Where the majority stockholders are clearly violating the chartered rights of the minority and putting their interests in imminent danger.³

¹*Lawrence v. Greenwich F. Ins. Co.* 1 Paige, 587; *Conro v. Gray*, 4 How. Pr. 166; *Willis v. Corties*, 2 Edw. Ch. 281; *Orphan Asylum v. McCartee*, Hopk. Ch. 429; *Hand v. Dexter*, 41 Ga. 454; *Western Div. of North Carolina R. Co. v. Drew*, 3 Woods, 691; *Sandford v. Sinclair*, 8 Paige, 373; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *Re Belton*, 47 La. Ann. 1614, 30 L. R. A. 648.

²*Bailey v. Pittsburg Coal R. Co.* 189 Pa. 213; *Lane's Appeal*, 105 Pa. 49; *Bell's Appeal*, 115 Pa. 88.

As a rule, whatever power the corporation had to collect assessments passes to the receiver under the direction and control of the court. *Showalter v. Laredo Improv. Co.* 83 Tex. 162; *Vanderwerken v. Glenn*, 85 Va. 9; *Howard v. Glenn*, 85 Ga. 238; *Hightower v. Thornton*, 8 Ga. 486; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Merchants Nat. Bank v. Northwestern Mfg. & Car Co.* 48 Minn. 361; *Means' Appeal*, 85 Pa. 75; *Van Wagenen v. Clark*, 22 Hun, 497; *Rankins v. Elliott*, 16 N. Y. 377; *Sagory v. Dubois*, 3 Sandf. Ch. 466.

³*Hand v. Dexter*, 41 Ga. 454. In *State Journal Co. v. Commonwealth Co.* 43 Kan. 93, a corporation was embarrassed by debts, and dissensions existed between its officers likely to injure the value of its property, a receiver was appointed on the application of the mortgagee.

State, Independent Dist. Teleg. Co.,

v. Silver Bow County Second Judicial Dist. Ct. 15 Mont. 324, 27 L. R. A. 392; *Re Lewis's Petition*, 52 Kan. 660. In this case the court say: "By the averments of the petition it would appear that all officers of the corporation have conspired together to divert its business to another company and to absorb its earnings and assets and appropriate the same to their own use.

* * * In most cases of this character no other adequate remedy exists. The appointment of a receiver is not necessarily a proceeding to dissolve a corporation, nor will it necessarily result in its extinction. The property and assets of the corporation which are being dissipated and fraudulently absorbed will be preserved and rightfully applied under the supervision of the court and may be restored to the officers of the corporation when there has been a change of officers, or when it is deemed prudent and safe to restore the property and affairs of the corporation to its duly constituted officers." Cf. *First Nat. Bank v. United States Encaustic Tile Co.* 105 Ind. 227; *Wayne Pike Co. v. Hammons*, 129 Ind. 368; *Supreme Sitting O. of I. H. v. Baker*, 134 Ind. 293, 20 L. R. A. 210; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 43 Fed. Rep. 204; *Miner v. Belle Isle Ice Co.* 93 Mich. 97, 17 L. R. A. 420.

Minority stockholders may secure

(k) Upon the application of judgment creditors.¹

§ 226. When not appointed.

Owing to the fact that the appointment or refusal to appoint a receiver in all cases rests in the sound judicial discretion of the court under all the circumstances of each particular case it is impossible to lay down any well-established principles under which the court, will refuse to lend its aid and refuse to appoint. A few general principles, however, may be stated that have received the approval of courts of last resort that may serve, to a greater or less extent, as guiding principles.

(a) The court will not appoint a receiver and take from the directors of a corporation the control and management of the corporate business except in proceedings instituted for the purpose of dissolving the corporation under statutory authority therefor.²

the appointment pending investigation of gross fraud by the majority stockholders. *State, Independent Dist. Teleg. Co., v. Silver Bow County Second Judicial Dist.* Ct. 15 Mont. 324, 27 L. R. A. 392.

¹ A judgment creditor who has had execution returned unsatisfied may file a bill in equity and have the corporation property and assets applied in his favor. *Hervey v. Illinois M. R. Co.* 28 Fed. Rep. 169; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 29 L. ed. 963; *Sage v. Memphis & L. R. R. Co.* 125 U. S. 861, 31 L. ed. 694; *Palmer v. Clark*, 4 Abb. N. C. 25.

In England judgment creditors cannot levy an execution on a railroad, but are entitled to a receiver of the income. *Re Manchester & M. R. Co.* L. R. 14 Ch. Div. 645.

The appointment of a receiver in behalf of a creditor, however, must be made in good faith and not for the purpose of hindering and delaying other creditors. *Re Receivers of Philadelphia & R. R. Co.* 14 Phila. 501; *Howard v. La Crosse & M. R. Co.* Woolw. 49.

As a general rule the right under consideration does not apply to a general creditor. *Lehigh Coal & Nav. Co. v. Central R. Co.* 43 Hun, 546; *Pond v. Framingham & L. R. Co.* 130 Mass. 194. But see *Belmont Nail Co. v. Columbia Iron & S. Co.* 46 Fed. Rep. 8; *Avery v. Brees Mfg. Co.* 27 N. J. Eq. 412; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 43 Fed. Rep. 204.

² *Port Huron & G. R. Co. v. St. Clair Circuit Judge*, 81 Mich. 456; *Baker v. Louisiana Portable R. Co.* 34 La. Ann. 754; *French v. Gifford*, 30 Iowa, 148; *Hedges v. Paquett*, 8 Or. 77; *Bartlett v. West Metropolitan Tramway Co.* [1893] 3 Ch. 487.

In *Supreme Sitting, O. of I. H. v. Baker*, 134 Ind. 293, 20 L. R. A. 210, it is held that a court of equity has no power independently of statute to dissolve an insolvent corporation is well settled. The authorities seem to be universal in holding this doctrine. We have been cited to no authorities holding a contrary doctrine and we have been unable to find any in the search we have made. There is no statute in this state (Indiana) authorizing a

(b) Mere disagreement between the parties as to the management of the corporate business furnishes no sufficient ground for the appointment ;¹ nor,

court of equity to dissolve a corporation on such a proceeding as the one at bar brought on behalf of individual stockholders or shareholders as the appellees are in this case. Hence the action cannot be sustained or recorded as one having for its object the dissolution of the corporation on the ground of insolvency or being in imminent danger of insolvency.

In *Spelling, Priv. Corp.* § 1001, it is said: "The legislation of the various states providing for the appointment of receivers of insolvent corporations is based upon the just and reasonable policy of protecting those who would otherwise be without adequate remedy in the usual course of legal proceedings in case of the insolvency of the corporation. And the same reasons exist for the appointment whether the insolvency has been caused by the misconduct and infidelity of the companies' officers or from other causes. The statutory power thus confirmed, with a few exceptions, does not extend to authorize the court to dissolve the corporation. * * * The court seeks not to destroy rights but to preserve them and for the accomplishment of this end the annihilation of the franchise is unnecessary. That duty concerns the sovereign and where its performance becomes necessary the court of law is the appropriate tribunal." In speaking of the action of a court of equity in appointing a receiver in a corporation matter the court in *Supreme Sitting, O. of I. H. v. Baker, supra*, further said: "A court of equity should not ruthlessly wrest from the legally constituted officers of the corporation the management of its affairs and the property of the corpo-

ration and turn it over to the hands of a receiver. Such power should not be exercised by a court of equity except with due care and in a case where it is clearly made to appear that it is for the best interest of the parties interested and it will not be presumed that a court of equity will exercise such power except where the exigencies of the case clearly warrant it."

¹*American Loan & T. Co. v. Toledo, O. & S. R. Co.* 29 Fed. Rep. 416.

A receiver should not be appointed to prevent a public sale of the assets of the corporation to satisfy its bonds where the proof does not show that those in the management of the corporation are acting unfaithfully or are wasting the assets. *Ft. Payne Furnace Co. v. Ft. Payne Coal & I. Co.* 96 Ala. 472. Where an action is to prevent the illegal consolidation of two railroad companies and stockholders in violation of an injunction elected directors of the new company, there are no grounds for the appointment of a receiver for either company. *Cleveland, C. C. & I. R. Co. v. Jewett*, 37 Ohio St. 649 (see Revised Statutes, § 8383); *Cincinnati, S. & C. R. Co. v. Sloan*, 81 Ohio St. 15; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 488.

In *Stockton v. Central R. Co.* 50 N. J. Eq. 489, it is held that where it becomes necessary to compel obedience to an injunction or a decree the court may appoint a receiver to control the defendant property. The court say: "The power of the court to appoint such a receiver when the appointment is necessary to effectuate its decree has not been disputed. Such power is so essential at times to the efficient exercise of the court's jurisdiction that it

(c) Where on application of minority stockholders it appears that reasonable effort has not been made to secure redress through the company or its legally constituted authorities;¹ nor

(d) Where the law affords an adequate remedy;² nor

has become too well established either to be seriously questioned or to need citation of authority to support it." In the above case it was represented that a scheme existed between the defendants to restrict and prevent competition in the production and sale of coal, a staple commodity in this state, and thereby to effect an increase in the price thereof. An order to show cause why a receiver should not be appointed was issued and an injunction pending such order was granted, after which it was represented to the court that the injunction had been disobeyed by the companies acting in combination with each other.

In *Wanneker v. Hitchcock*, 88 Fed. Rep. 383, it is held that the fact that there may be differences of opinion or judgment between the trustees to whom corporate stock is devised for the use of others as to the policy to be pursued by the corporation and the proper persons to be voted for as directors, does not make a case where a court is authorized to appoint a receiver for such stock.

In *Harmon v. Kentucky Coal I. & D. Co.* 15 Ky. L. Rep. 12, it is held that a receiver will not be appointed over a corporation and its property taken from those having much greater interest therein than the applicant where no disposition is shown on their part to deprive the applicant of any right in the property and where the only purposes of such applicant is to ascertain what interest he has now in the property or its proceeds.

It is held in *Hardee v. Sunset Oil Co.* 56 Fed. Rep. 51, that the irregular action by the directors in assessing

and advertising for sale its capital stock and the careless manner of keeping the books and records of the company and illegal action in voting itself salaries where otherwise the corporation has been economically managed, no fraudulent intention or purpose being shown, a receiver will not be appointed.

¹*Roman v. Woolfolk*, 98 Ala. 219; *Mack v. DeBardleben Coal & I. Co.* 90 Ala. 396, 9 L. R. A. 650; *Merchants & P. Line v. Waganer*, 71 Ala. 581; *Graeaves v. Gouge*, 69 N. Y. 154; *Brewer v. Boston Theatre Props.* 104 Mass. 378; *Howes v. Contra Costa Water Co.* ("Howes v. Oakland") 104 U. S. 450, 26 L. ed. 828; *Plucker v. Emporia City R. Co.* 48 Kan. 577; *Bacon v. Irvine*, 70 Cal. 221.

The policy of the law is to leave the affairs of a corporation to the management and control of its own chosen agencies and that a minority of the stockholders will not be permitted to displace corporate authority and control and substitute therefor the policy, management, and control of the courts except in plain cases of such fraud or maladministration as works manifest oppression or wrong to them; and that before calling upon the court to take into its hands the administration of its corporate affairs it must be made clearly to appear not only that such oppression or wrong to them depends, but that every reasonable effort has been made to secure redress and prevention of further mischief within the company itself. *Roman v. Woolfolk*, 98 Ala. 219.

²*Pressley v. Lamb*, 105 Ind. 171.

(e) Where the application is based upon the alleged failure of the operators to keep a railroad in suitable repair, and the operating company is responsible and acknowledges its duty and is compelled by law to keep the road in repair;¹ nor

(f) Where the defendant is a foreign corporation and has no property in the state;² nor

(g) Where a suit is pending to try the title to the possession of the premises;³ nor

(h) Where in case of foreclosure of a mortgage the right to foreclose is not clear and undisputable;⁴ nor

(i) Where there is no showing of danger or loss;⁵ nor

(j) Where there will be no proceeds to distribute after the payment of the mortgage indebtedness;⁶ nor

(k) Where the claims against the corporation are unascertained and are small as compared with the value of its property;⁷ nor

(l) Where the applicant is a secured creditor and he seeks to obtain a receiver over property not subject to the litigation;⁸ nor

(m) Where the property over which a receiver is sought is rightfully in the possession of a person appointed by the mortgagees under powers contained in the mortgage.⁹

§ 227. Fraud as ground for appointment.

Fraud and collusion on the part of the officers and directors of a corporation which may result in danger of the loss of the prop-

¹ *Boston, C. & M. R. Co. v. Boston & L. Railroad*, 65 N. H. 393.

² *Haar v. Consolidated Carson River Dredging Co.* 43 N. Y. S. R. 1.

³ *Emerson's & Wall's Appeal*, 95 Pa. 258.

⁴ *American Loan & T. Co. v. Toledo, O. & S. R. Co.* 29 Fed. Rep. 416.

⁵ *Houchin v. Turner*, 89 Ga. 26; *Baltimore & O. R. Co. v. Cannon*, 72 Md. 493; *Baltimore & O. Teleg. Co. v. Interstate Teleg. Co.* 54 Fed. Rep. 50, 8 U. S. App. 340; *Watkins v. National Bank of Lawrence*, 51 Kan. 254; *Hinckley v. Bethen*, 78 Me. 221; *McGeorge v. Big Stone Gap Improv. Co.* 57 Fed. Rep. 262. The appointment is discretionary on proof of insolvency, and not a matter of right. *Id.*

⁶ *Pyles v. Riverside Furniture Co.* 30 W. Va. 123; *Mercantile Invest. & Gen. T. Co. v. River Plate Trust, L. & A. Co.* [1892] 2 Ch. 303.

⁷ *Virginia T. & C. Steel & I. Co. v. Wilder*, 88 Va. 942.

The court will not, in deference to the mere technical rights of a very small minority of bondholders of a railroad corporation, appoint a receiver, where it appears that such action would imperil, if not destroy, the interests of others whose rights are entitled to equal consideration. *Tyson v. Wabash R. Co.* 8 Biss. 247.

⁸ *Wormser v. Merchants' Nat. Bank*, 49 Ark. 117; *Noyes v. Rich*, 52 Me. 115.

⁹ *Re Pound*, L. R. 42 Ch. Div. 402.

erty of such corporation constitute sufficient ground for the interference of a court of equity and the appointment of a receiver over its property and business.' But where fraud constitutes the gravamen of the charge the facts which constitute the alleged fraud must set out specifically and clearly; the court will not act upon general allegations.³ Nor will the fraud of the majority of the directors be sufficient to warrant the interference of the court in the appointment of a receiver if plaintiff has, otherwise, complete redress, nor will a mere apprehension that such frauds may be repeated be sufficient,⁴ nor will relief be granted if the plaintiff is not free from blame in the matters of which he complains.⁴

§ 228. Insolvency as ground for appointment.

A court of equity has no inherent power as such to appoint a receiver over an insolvent corporation, but in most of the states in this country, as well as in England, statutory powers have been granted enabling the courts to interfere, on proper application, in the matter of insolvent corporations, and appoint a receiver to take charge of their affairs, wind up their business and distribute their assets among creditors, shareholders, or those entitled thereto; and this power, in some cases, has been extended to the end of dissolving the corporation and forfeiting its charter privileges. As a rule the statute prescribes the method of procedure, and by whom the application shall be made, sometimes a creditor and sometimes a shareholder being authorized to put the machinery in motion. The constitutionality of this class of legislation

¹*Haywood v. Lincoln Lumber Co.* 64 Wis. 689; *Miner v. Belle Isle Ice Co.* 98 Mich. 97, 17 L. R. A. 412; *Davis v. Memphis City R. Co.* 22 Fed. Rep. 888; *Sellers v. Phoenix Iron Co.* 13 Fed. Rep. 20; *Wayne Pike Co. v. Hammons*, 129 Ind. 868; *Blatchford v. Ross*, 54 Barb. 42; *Hedges v. Paquett*, 3 Or. 77. Only such directors and officers as participate in the fraud are liable. *Metropolitan Elev. R. Co. v. Kneeland*, 120 N. Y. 184, 8 L. R. A. 258; *Merrick v. Peru Coal Co.* 61 Ill. 472; *Holland v. Lewiston Falls Bank*, 52 Me. 564; *Ellis v. Ward*, 187 Ill. 509; *People v. Bruff*, 9 Abb. N. C. 153; *St. Louis*

& S. Coal & Min. Co. v. Edwards, 108 Ill. 472; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 48 Fed. Rep. 208; *Towle v. American Bldg. L. & I. Soc.* 60 Fed. Rep. 181; *Buck v. Piedmont & A. Life Ins. Co.* 4 Fed. Rep. 849.

²*Fort Payne Furnace Co. v. Fort Payne Coal & I. Co.* 96 Ala. 472; *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622; *Oakley v. Paterson Bank*, 2 N. J. Eq. 178.

³*Laurel Springs Land Co. v. Fougerey*, 50 N. J. Eq. 756.

⁴*Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 182.

is not to be called in question either by the corporation itself, or by those with whom it has contract relations, since in the one case, by its condition of insolvency, it has become impossible to further carry on the corporate functions with which it has been invested by the lawmaking power, and in the other the very purpose of such legislation is the preservation of the rights of those having contractual relations with it by the equitable distribution of its assets among those entitled thereto.¹

The insolvency of insurance companies and the proper protection of their creditors by the due distribution of their assets has been the subject of much litigation, and is now usually regulated by statutes. Sometimes these statutes confer the power upon courts to dissolve the corporations and distribute the assets, while in other instances the dissolution is effected by an action in the name of the state, leaving the distribution of the assets and the adjustment of the rights of all parties to courts of chancery, the receiver in such cases being an important instrumentality.²

¹By an act of the legislature the governor of Georgia was authorized to appoint a fit and proper person to act as receiver of a bank, if it failed or refused to redeem its notes in specie, or if the notes depreciated to the extent of 10 per cent or upwards. The Bank of Macon, it appeared, had failed to redeem its notes; all or nearly all its stock had accumulated in the hands of one individual, and he was dead and insolvent, from which the court found as an irresistible conclusion that the corporation could never be revived "by any power short of that which raised up Lazarus from the grave." Under this state of facts the governor appointed a receiver and it was contended: (1) That the appointment of a receiver was a judicial act, and not legislative; and (2) that the appointment of a receiver under the legislative act impaired the obligation of contract by depriving the corporation of the power to sue.

The court held that the appoint-

ment of a receiver was not judicial in that it did not determine any controversy, or any right legal or equitable, and that his duties consisted in collecting, holding, and distributing the assets of the bank for the benefit of all concerned; also that the obligation of the contract was not impaired, among other reasons because the statute was remedial in its nature and therefore like all similar statutes within legislative control. *Carey v. Giles*, 9 Ga. 253.

²As instructive cases in the matter of the adjustment of the rights and interests of creditors and policy holders, under statutes governing the dissolution of insurance companies, see *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 83 N. Y. 336; *Atty. Gen. v. North American L. Ins. Co.* 82 N. Y. 172; *People, Atty. Gen., v. Security L. Ins. Co.* 71 N. Y. 222; *People, Atty. Gen., v. Security L. Ins. & A. Co.* 79 N. Y. 267; *Atty. Gen. v. North American L. Ins. Co.* 80 N. Y. 153; *Atty. Gen. v.*

Insolvency of a building and loan association coupled with proof of mismanagement and fraud on the part of its officers, is likewise a ground for the appointment of a receiver.¹

Where insolvency is made a ground for the appointment of a receiver by statute, insolvency in such case becomes a jurisdictional fact and the proof must be clear and convincing.² Insolvency being established, and a receiver appointed, the administration of the estate must of necessity be left largely to the judgment and discretion of the court, and only flagrant injustice and error will warrant an appellate court in interfering with such discretion,³ and the court, in order to protect the receiver in his possession, and secure the rights of all parties in interest, may make all necessary orders, by injunction or otherwise, touching the delivery, management, or disposition of the corporate property and assets.⁴

North American L. Ins. Co. 89 N. Y. 94; *Carr v. Hamilton*, 129 U. S. 252, 32 L. ed. 669; *McDonald v. Ross-Lewin*, 29 Hun. 87; *Tipppecanoe Twp. v. Manlove*, 39 Ind. 249; *Embree v. Shideler*, 36 Ind. 423; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Wardle v. Townsend*, 75 Mich. 385, 4 L. R. A. 511. As to the liability of members of mutual fire insurance companies and the enforcement of such liability, see *Shaughnessy v. Rensselaer Ins. Co.* 21 Barb. 605; *Savage v. Medbury*, 19 N. Y. 82; *Williams v. Babcock*, 25 Barb. 109; *Sands v. Sanders*, 28 N. Y. 416.

A receiver *pendente lite* will not be appointed for a mutual fire insurance corporation on the ground that it is insolvent, where the examiners of the insurance department, in determining that its indebtedness exceeded its assets by \$53,000, omitted to credit it with \$160,000 of capital stock notes authorized by the law under which it was organized and doing business. *People v. Equitable Mut. F. Ins. Co.* 1 App. Div. 93.

The ability and offer of a mutual fire insurance company pending an

action to dissolve it, to restore its capital which has been impaired by some of its officers acting without authority, by supplying funds to any amount directed by the insurance department, will be considered in determining an application for the appointment of a receiver *pendente lite*. *People v. Equitable Mut. F. Ins. Co. supra*.

¹ *Twiss v. American Bldg. L. & I. Soc.* 60 Fed. Rep. 181.

² *Parsons v. Monroe Mfg. Co.* 4 N. J. Eq. 187; *Atlantic Trust Co. v. Consolidated Elec. Storage Co.* 49 N. J. Eq. 403. Where, however, the conduct of the officers of a corporation are satisfactorily established as fraudulent it is not only proper but it is the duty of the court to wrest from such officers the management of the company and place the company in the charge of a receiver. *Nichols v. Perry Patent Arm Co.* 11 N. J. Eq. 126; *Atty. Gen. v. Bank of Columbia*, 1 Paige, 511.

³ *Wilmington Star Min. Co. v. Allen*, 95 Ill. 288.

⁴ *Morgan v. New York & A. R. Co*

As in the case of fraud so also in the case of insolvency the allegations of the bill or petition must be clear and explicit. It is not sufficient that they be made merely upon information and belief,¹ and especially so where the allegations are denied.² Where the statute has not otherwise provided, the great weight of authority is that a receiver will not be appointed upon the petition of the corporation itself, even upon positive averments of its in-

10 Paige, 290. Where a receiver is appointed over a corporation it is the duty of the officers and managers of the company to deliver its assets to the receiver and a refusal on their part constitutes contempt, and is punishable as such on application of the receiver or parties in interest. *Young v. Rollins*, 90 N. C. 125.

An injunction will be granted to restrain a director of a corporation from collecting money due it or from paying out its assets, and a temporary receiver will be appointed, during the pendency of an action against him under N. Y. Code Civ. Proc. §§ 1781, 1782, for mismanagement, and to compel him to account, where it is apparent that plaintiff will be entitled to part of the relief demanded, and, to make the judgment effectual, it is desirable, if not absolutely necessary, to preserve the existing status. *Piza v. Butler*, 90 Hun, 254.

¹ In *Atlantic Trust Co. v. Consolidated Elec. Storage Co.* 49 N. J. Eq. 402, the vice chancellor says: "The exercise of this power to its full extent extinguishes a mere manufacturing or mercantile corporation completely and forever. The power is a strong one. Chancellor Williamson in *Rawnsley v. Trenton Mut. L. Ins. Co.* 9 N. J. Eq. 95, called it an extraordinary power. One that should be exercised with great caution, and only when the circumstances of the case and the ends of justice required its exercise. The statute makes insol-

ency the jurisdictional fact. The court can do nothing—neither issue an injunction nor appoint a receiver—until insolvency is first established. That, in the language of Governor Pennington, is the foundation of the power and unless it is satisfactorily made out the court has no jurisdiction. *Oakley v. Paterson Bank*, 3 N. J. Eq. 173, 176; *Parsons v. Monroe Mfg. Co.* 4 N. J. Eq. 187, 206; *Drum-dred v. Paterson Mach. Co.* 4 N. J. Eq. 294, 305. Chancellor Halstead expressed substantially the same view in *Goodheart v. Raritan Min. Co.* 8 N. J. Eq. 73, 77. And Mr. Justice Depue in pronouncing the opinion of the court of errors and appeals in *New Foundland R. Const. Co. v. Schack*, 40 N. J. Eq. 222, 226, declared, in describing what averments a bill in such a case must contain, that it was not sufficient that the bill should merely allege that the corporation had become insolvent and had suspended its business for want of funds to carry on the same, but that the facts and circumstances on which the complainant relies to prove insolvency must be set out. * * * The proof in support of a jurisdictional fact must always be clear and convincing for the court derives its power from the fact, and hence, until the fact is shown to exist, it has no power." Cf. *Livingston v. Bank of New York*, 5 Abb. Pr. 388; *Vanderbilt v. Central R. Co.* 48 N. J. Eq. 669.

² *Atty. Gen. v. Bank of Columbia*, 1 Paige, 511.

solvency, some of the cases holding that the appointment is voidable and others holding the appointment to be absolutely void.¹ Nor will a receiver of a corporation be appointed upon an *ex parte* application for the reason that so many interests may be involved. It is doubtful if the court should act in any case of this character until the corporation has had an opportunity to be heard.²

§ 229. In foreclosure proceedings.

The rules applicable to the appointment of receivers, and their powers, duties, and relations in the matter of foreclosure of mortgages executed by corporations, are not essentially different from those in ordinary foreclosures, and that subject is not enlarged upon in this connection. The same is also true in reference to receiverships in creditors' proceedings, based upon creditors' bills, supplementary proceedings, and proceedings in aid of executions.³

§ 230. Effect of appointment.

In regard to the effect of the appointment, of a receiver over the property of a corporation it may be stated as general propositions:

(a) All liens existing at the time of the appointment whether by mortgage, judgment, or otherwise, upon the property of the corporation, remain unimpaired, and the existing rights of all parties, so far as the corporate assets are concerned, remain *in statu quo*.⁴

¹ *Jones v. Bank of Leadville*, 10 Colo. 464; *Kimball v. Goodburn*, 82 Mich. 10; *Hugh v. McRae*, Chase, Dec. 466; *McIlhenny v. Bins*, 80 Tex. 1; *Hinckley v. Pfister*, 88 Wis. 64; *State, Merriam, v. Ross*, 122 Mo. 435, 23 L. R. A. 584; *La Société Française v. 15th Judicial Dist. Ct.* 53 Cal. 495; *Neall v. Hill*, 16 Cal. 145; *French v. Gifford*, 80 Iowa, 160; *Whitehead v. Wooten*, 43 Miss. 523. See *contra*, *Re Kittanning Ins. Co.* 146 Pa. 102; and *Wabash, St. L. & P. R. Co. v. Central Trust Co.* 22 Fed. Rep. 272.

² *Devos v. Rhaca & O. R. Co.* 5 Paige, 521.

³ See Chap. X.

⁴ *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 34 L. ed. 341; *Risk v. Kansas Trust & Bkg. Co.* 58 Fed. Rep. 45; *Re Home Provident Safety Fund Asso.* 129 N. Y. 288; *Hubbard v. Hamilton Bank*, 7 Met. 340. There is nothing in the New Jersey "act to prevent frauds by incorporated companies" which interferes with the

(b) As to the possession, however, if the appointing court has jurisdiction, and the receiver has qualified by giving the requisite bond, his possession will be protected as against all persons whomsoever, the property being regarded as *in custodia legis*.¹

(c) Nor can another court of co-ordinate jurisdiction interfere with the possession of the receiver, regulate his action, or remove him from his position.²

liens that exist when insolvency occurs or which authorizes the receiver to sell otherwise than subject to them. *Potts v. New Jersey Arms & O. Co.* 17 N. J. Eq. 576. Cf. *Bates v. Wiggin*, 37 Kan. 44. The receivership in no manner changes the terms of existing contracts. *Watson v. Phania Bank*, 8 Met. 217. As to the effect of receivership upon purchasers of real property pending the litigation, see *Newman v. Chapman*, 2 Rand. 98.

In *Kneeland v. American Loan & T. Co.* *supra*, the court say: "The appointment of a receiver vests in the court no absolute control over the property and no general authority to displace vested contract liens." See also *St. Louis, A. & T. H. R. Co. v. Cleveland, O. C. & I. R. Co.* 125 U. S. 658, 678, 81 L. ed. 882, 887. Goods lawfully seized by attachment from a court of law will not be ordered by a court of chancery having no supervisory power to be delivered to the receiver in the absence of statutory powers. *Ford v. Judsonia Mercantile Co.* 53 Ark. 426, 6 L. R. A. 714.

¹ See Chap. IV; also, § 280; also *Hagedorn v. Bank of Wisconsin*, 1 Pinney, 61. As a general rule a receiver appointed in a prior suit should not be displaced by the appointment of a receiver of the same subject-matter by the same court in a subsequent suit. The receivership in the first suit should be extended to the second, subject to the legal and equitable

claims of all parties, and the rights of the parties in each suit are substantially the same as if different persons had been appointed at the several times when such receiverships were granted. If, however, a different receiver is appointed, then, if the court has jurisdiction of the subject-matter and parties, and is the same court which made the first appointment, the receiver in the first suit must deliver to the receiver appointed in the second. *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201. Cf. *Skinner v. Maxwell*, 68 N. C. 400; *Walling v. Miller*, 108 N. Y. 178; *Maynard v. Bond*, 67 Mo. 815; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Blake Crusher Co. v. New Haven*, 46 Conn. 478; *Van Alstyne v. Cook*, 25 N. Y. 489; *Morrill v. Noyes*, 56 Me. 458; *Rutter v. Tallis*, 5 Sandf. 610; *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *Sercomb v. Callin*, 128 Ill. 556; *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1; *Richards v. People*, 81 Ill. 551; *Peck v. Crane*, 25 Vt. 146. The court has power to compel the delivery of property to the receiver. *American Const. Co. v. Jacksonville, T. & K. W. R. Co.* 52 Fed. Rep. 937; *Keokuk N. L. Packet Co. v. Davidson*, 18 Mo. App. 561; *Vermont & C. R. Co. v. Vermont C. R. Co.* 46 Vt. 792. See *Jacobson v. Landolt*, 78 Wis. 142.

² *Young v. Montgomery & E. R. Co.* 2 Woods, 606; *O'Mahoney v. Belmont*, 62 N. Y. 133; *Gest v. New Orleans, St. L. & C. R. Co.* 80 La. Ann. 28; *Coe v.*

(d) Nor will the court permit its receiver, without its leave, to be harrassed and interfered with by litigation.¹

(e) Nor is the receiver bound to carry out the unexpired leases of the person or corporation over whose property he is appointed.²

(f) Nor is he bound by the contracts of his predecessor, unless he adopts them as his own.³

Columbus, P. & I. R. Co. 10 Ohio St. 372; *Albany City Bank v. Schermerhorn*, 9 Paige, 372; *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1; *Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 323; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *Van Alstyne v. Cook*, 25 N. Y. 489; *Skinner v. Maxwell*, 68 N. C. 400; *Yuba County v. Adams*, 7 Cal. 35; *Maynard v. Bond*, 67 Mo. 315; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Stevenson v. Palmer*, 14 Colo. 565; *Hardy v. Tilton*, 68 Me. 195.

¹ *Ellicott v. United States Ins. Co.* 7 Gill, 307, unless the purpose of the bill is merely to preserve the property and not make a distribution. *Leathers v. Shipbuilders' Bank*, 40 Me. 386 (See statute). When the action is to dissolve the corporation the appointment suspends the right of action of creditors against the corporation and stockholders. *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Merchants' Nat. Bank v. Northwestern Mfg. & Car Co.* 48 Minn. 361; *Atty. Gen. v. North American L. Ins. Co.* 6 Abb. N. C. 293. See *City Water Co. v. State*, 88 Tex. 600; *Farmers' Loan & T. Co. v. Toledo & S. H. R. Co.* 43 Fed. Rep. 223. But see *Allen v. Central R. Co.* 42 Iowa, 683; *Green v. Walkill Nat. Bank*, 7 Hun, 68.

An attachment of the property of an insurance company after the filing of a bill in equity against it under Mass. Stat. 1894, chap. 523, § 7, with

a prayer for an injunction against its proceeding with business and for the appointment of a receiver of its property, is not valid, although made before any receiver is actually appointed; but on a subsequent appointment the receiver's rights relate back to the commencement of the proceedings. *Merrill v. Commonwealth Mut. F. Co.* (Mass.) 44 N. E. 144.

The court appointing a receiver of a corporation may order a creditor living within the jurisdiction to dismiss garnishment proceedings instituted by him against debtors of the corporation in other states, and upon his failure to comply therewith punish him for contempt. *Besuden v. E. Besuden Co.* 3 Ohio N. P. 165.

² *Ante*, § 36; § 230, ¶ e; also, *Re New Jersey & N. Y. R. Co.* 29 N. J. Eq. 67.

³ *Lehigh Coal & Nav. Co. v. Central R. Co.* 38 N. J. Eq. 175, 41 N. J. Eq. 167; *Kansas P. R. Co. v. Bayles*, 19 Colo. 348; *Cf. Com. v. Franklin Ins. Co.* 115 Mass. 278; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Southern Exp. Co. v. Western N. C. R. Co.* 99 U. S. 191, 25 L. ed. 319; *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 260. The New Jersey cases fully sustain the proposition announced in the text, but if the receiver is the arm of the court and, in good faith, makes a contract, the doctrine that such contract is not binding on his successor seems to be inequitable and unjust.

(g) Nor does the appointment of a receiver of a defunct corporation revive its corporate powers.¹

(h) The debtor's dominion or control over the property which forms the subject-matter of litigation and which is specified in the order at once ceases and becomes vested in the receiver.²

(i). Where the proceeding is a statutory one instituted to dissolve the corporation, and to wind up its business, and a judgment of dissolution is pronounced, and a receiver appointed to collect and distribute the assets it will be an abatement of all pending actions against the corporation.³

¹ *Stark v. Burke*, 5 La. Ann. 740.

² See *ante*.

And in many of the states having statutes authorizing the winding up of corporations by reason of insolvency, the appointment of a receiver operates as an assignment or transfer *ipso facto* of all the property of the corporation to such receiver, for the purpose of distribution.

It displaces the officers and directors from the possession and control. *Rochester v. Bronson*, 41 How. Pr. 73.

Where a receiver is appointed by a Federal court, and afterward a suit is brought in the state court and the charter forfeited, it was held that the appointment did not dissolve the corporation; nor was its existence in any way affected thereby; and suit against the corporation might be prosecuted for an indebtedness accruing before the appointment, and judgment may be rendered against it and enforced against any property not embraced in the receivership or that it might thereafter acquire. *City Water Co. v. State*, 88 Tex. 600; *Heath v. Missouri, K. C. & T. R. Co.* 88 Mo. 621; *St. Louis, A. & T. R. Co. v. Whitaker*, 68 Tex. 636.

The appointment of a receiver does not dissolve the corporation. *Bank Comrs. v. Bank of Buffalo*, 6 Paige, 497; *Kincaid v. Dwinelle*, 59 N. Y. 553; *Pringle v. Woolworth*, 90 N. Y.

510; *Ohio & M. R. Co. v. Russell*, 115 Ill. 52; *Stee v. Bloom*, 19 Johns. 456.

After the appointment of a receiver a creditor cannot sue to enforce unpaid subscriptions to the capital stock of an insolvent corporation. *Big Creek Stone Co. v. Seward* (Ind.) 42 N. E. 464; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Merchants' Nat. Bank v. Northwestern Mfg. & Car Co.* 48 Minn. 361. So also the appointment suspends all right of action by the corporation, unless the statute or order appointing otherwise provides. *Milwaukee Mut. F. Ins. Co. v. Sentinel Co.* 81 Wis. 207, 15 L. R. A. 637; *San Antonio & G. S. R. Co. v. Davis* (Tex.) 2 Am. & Eng. Corp. Cas. N. S. 374.

³ *McCulloch v. Norwood*, 58 N. Y. 563; *Colorado Nat. Bank v. Scott*, 19 Abb. N. C. 848; *Davenport v. City Bank of Buffalo*, 9 Paige, 12; *Leathers v. Shipbuilders' Bank*, 40 Me. 386 (see Stat.); *Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574. But the fact of the appointment of a receiver alone does not effect an abatement (*Heath v. Missouri, K. C. & T. R. Co.* 88 Mo. 617; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80; *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199), though the means of enforcing the claims after judgment may be taken away (*Ibid*; *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1; *Skinner v.*

§ 231. The receiver's relationship.

The receiver of a corporation occupies a three-fold relationship.

(a) He is the agent of the court from which he receives his appointment, and his powers and duties are measured by the order of his appointment and the rules and practice of the court making such order.

(b) He is also the trustee of the corporation creditors and shareholders in respect to their interests in the property and assets of the corporation and their respective rights to participate in the distribution thereof.¹

(c) He is likewise the representative of the corporation in respect to the title to the corporate property and the right to sue and defend in regard thereto. In general he takes the rights of the corporation such as could be asserted in its own name and on that basis only can he litigate for the benefit of creditors and stockholders, except where acts have been committed in fraud of the rights of creditors, such acts being valid as to the corporation, but invalid as to the receiver in his representative character.² It

Maxwell, 68 N. C. 400; *Rutter v. Talbot*, 5 Sandf. 610; *Maynard v. Bond*, 67 Mo. 815; *Gest v. New Orleans, St. L. & O. R. Co.* 30 La. Ann. 28, until the property of the corporation is returned to it. *Heath v. Missouri, K. O. & T. R. Co. supra*. No doubt the court may in a proper case enjoin the prosecution of suits against the corporation. *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272.

¹ Mr. Justice Andrews, in *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46, says: "The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defense which would have been good against the former may be asserted against the latter. But there is a recognized exception which permits a receiver of an insolvent individual or corporation in the interest of creditors to disaffirm dealings of the debtor in fraud of their rights."

Gillet v. Moody, 8 N. Y. 479; *Porter v. Williams*, 9 N. Y. 142; *Curtis v. Leavitt*, 15 N. Y. 9, 108; *Libby v. Rosekrans*, 55 Barb. 202; *Alexander v. Relfe*, 74 Mo. 495; *Atchison v. Davidson*, 2 Pinney, 48; *Morrill v. Noyes*, 56 Me. 458; *Brown v. Warner*, 78 Tex. 548, 11 L. R. A. 894; *Com. v. Franklin Ins. Co.* 115 Mass. 278; *Herrick v. Miller*, 123 Ind. 804.

² See last note above, also, *Mandeville v. Avery*, 124 N. Y. 376; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46; *Wright v. Nostrand*, 94 N. Y. 81; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Whitelsey v. Delaney*, 78 N. Y. 571; *Bostwick v. Menck*, 40 N. Y. 883; *Zuckerman v. Brown*, 83 N. Y. 297; *Bate v. Graham*, 11 N. Y. 237; *Manley v. Rasiga*, 13 Hun, 288; *Leavitt v. Yates*, 4 Edw. Ch. 184; *Chamberlain v. O'Brien*, 46 Minn. 80; *Farmers' Loan & T. Co. v. Minneapolis Engine & Mach. Works*, 85 Minn. 548; *Walsh v. Byrnes*, 89

should be observed in this connection that where the receiver is the trustee or representative of the creditors his rights are co-extensive only with the rights of such creditors, and he can maintain a suit in their behalf to the extent only to which, but for the receivership, they might maintain such action.¹ This principle

Minn. 527; *Bliss v. Doty*, 36 Minn. 168; *Weston v. Loyhed*, 30 Minn. 221; *Alexander v. Relfe*, 74 Mo. 495; *Hamlin v. Wright*, 23 Wis. 491; *Hill v. Western & A. R. Co.* 86 Ga. 284; *Prescott v. Pfeiffer*, 57 Mich. 21. In many of the states the power of the receiver to institute and carry on actions to set aside fraudulent conveyances is given by statute. The doctrine of the text, so far as it relates to the receiver's right to avoid the fraudulent acts of the debtor, is probably supported by the weight of authority, but is strenuously opposed by the supreme court of Illinois in *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 167, 13 L. R. A. 828. In that case Mr. Justice Baker, after an exhaustive review of the authorities in this country and in England, holds that a receiver can maintain an action to set aside a transaction binding on the person or corporation for whom he is receiver, only: (1) Where the receiver by force of some statute can act for the creditors; (2) where the act complained of was *ultra vires* and not binding on the corporation; (3) where the receiver was appointed in a proceeding prosecuted by creditors at whose instance and to secure whose claims he was appointed in actions supplemental to execution; (4) where the receiver was suing for property or assets that belonged to the debtor, and concludes in the following language: "We think the decided weight of authority sustains the rule in respect to the powers of receivers, where there has been no enlargement of their powers by legis-

lative enactment, that they have such rights of action only as were possessed by the persons or corporations upon whose estates they administer. But see *Haztun v. Bishop*, 3 Wend. 13; *Eastern Bank v. Capron*, 22 Conn. 639.

¹ *Young v. Clapp*, 147 Ill. 176; *Russell v. Chicago Trust & Sav. Bank*, 139 Ill. 588, 17 L. R. A. 345; *Goddard v. Stiles*, 90 N. Y. 199; *Bostwick v. Menck*, 40 N. Y. 388; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Corning v. White*, 2 Paige, 567; *Burrall v. Leslie*, 6 Paige, 567; *Safford v. Douglas*, 4 Edw. Ch. 538; *Porter v. Williams*, 9 N. Y. 150; *Banks v. Potter*, 21 How. Pr. 478; *Howell v. Ripley*, 10 Paige, 48; *Cumming v. Edgerton*, 9 Bosw. 684; *Detroit First Nat. Bank v. Barnum Wire & I. Works*, 60 Mich. 487; *King v. Goodwin*, 130 Ill. 102; *Osgood v. Ogden*, 8 Abb. App. Dec. 425; *Zuckerman v. Brown*, 88 N. Y. 297.

A receiver of a corporation stands in the places of the corporation itself, and is estopped from maintaining any action or setting up any defense where the corporation would have been estopped. *McLaren v. Milwaukee First Nat. Bank*, 76 Wis. 259; *Lincoln v. Fitch*, 42 Me. 456; *Curtis v. Leavitt*, 15 N. Y. 9, 296; *Cutting v. Damorel*, 88 N. Y. 410; *Farwell v. Mecalif*, 68 N. H. 276; *Hoar v. Harshaw*, 49 Wis. 379. If, however, he represents the creditors, it is otherwise, *Huiskamp v. Molins Wagon Co.* 121 U. S. 310, 30 L. ed. 971.

Where a corporation is being wound up the receiver is a statutory trustee

has more particular application to supplemental proceedings, and proceedings in the nature of creditors' bills wherein the receiver is the especial representative of the creditor or creditors instituting the proceeding.

§ 232. **The receiver as manager.**

While it is true that under ordinary circumstances the court will decline to order the receiver to continue the business of the person or corporation over whose property he is appointed, yet there are cases in which it is not only proper but in which it is the duty of the court to do so. This is especially proper where, as in the case of quasi-public corporations, public interests are to a greater or less extent involved. There is also another ground upon which this exception to the general rule is sometimes based as where, owing to the peculiar nature of the corporate business, it is necessary for the due protection of the interest of all parties to sell the corporate property and franchises, including the goodwill as a going concern. Hence, in such case, it is not only expedient but a judicial duty to preserve, in the meantime, the corporate property and business intact. True, in a general sense, the court should not assume the management of private business and interests or assume the functions of corporations,¹ yet, on the contrary, it will not wantonly destroy the value of corporate property in which many interests and possibly conflicting interests may be involved, and where the owners of such interests may be wholly powerless to act or intercede except through the legally constituted corporate authorities, the latter frequently being the parties whose acts justify the intervention of the court. There is probably no other branch of the law of receivership requiring the ex-

for all creditors of the corporation. *Libby v. Rosekrans*, 55 Barb. 202; *Atty. Gen. v. North American L. Ins. Co.* 83 N. Y. 172; *Bockes v. Hathorn*, 78 N. Y. 222; *Pittsburg Carbon Co. v. McMullin*, 119 N. Y. 46, 7 L. R. A. 46; *Whittlesey v. Delaney*, 73 N. Y. 571; *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 237.

As the representative of the creditors, in their relation to each other

the receiver occupies a position of indifference and impartiality. *Holbrook v. American F. Ins. Co.* 6 Paige, 220; *People, Atty. Gen., v. Security L. Ins. & A. Co.* 79 N. Y. 267; *Re Van Allen*, 37 Barb. 230; *Detroit First Nat. Bank v. Barnum Wire & I. Co.* 58 Mich. 315.

¹ See Lord Thurlow's remarks in *Ex parte O'Reilly*, 1 Ves. Jr. 112, and note by Mr. Hovenden, p. 130.

ercise of greater caution on the part of the court than that which relates to the appointment of a receiver over corporations, which have not been judicially declared insolvent, or which are not clearly so.¹ The court has sometimes been made the instrument of designing plaintiffs for wresting from the proper and legally constituted corporate authorities the management of the corporate interests, without other basis than the ill will, or disappointed ambition of the moving parties. At other times the equitable powers of the court have been illegitimately invoked for the pur-

¹See memorial of the state of South Carolina to Congress in 28 Am. L. Rev. 161. In Indiana where the statute (Rev. Stat. 1881, § 1222) provides that in case the corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights, a receiver may be appointed, it has been held that "a court of equity should not ruthlessly take from the legally constituted officers of a corporation the management of its affairs and the property of the corporation and turn it over to the hands of a receiver. Such power should not be exercised by a court of equity except with due care and in a case where it is clearly made to appear that it is for the best interest of the parties interested, and it will not be presumed that a court of equity will exercise such power except when the exigencies of the case clearly warrant it; and we think under our statute the court has such power when it is clearly made to appear that the exigencies of the case demand it." Cf. *Supreme Sitting, O. of I. H. v. Baker*, 134 Ind. 293, 20 L. R. A. 210. In this case the court say: "It would seem from the general scope and tenor of the prayer of the complainant in this case that the relief sought by appellees was a dissolution of the corporation on the grounds of its insolvency and general misman-

agement of its officers and the appointment of a receiver to wind up its affairs. This it would seem is what the pleader had in mind when he drafted the prayer of the complaint. That a court of equity has no power independently of statute to dissolve an insolvent corporation is well settled. The authorities seem to be universal in holding this doctrine. * * * There is no statute in this state authorizing a court of equity to dissolve a corporation on such a proceeding as the one at bar brought on behalf of individual stockholders or shareholders as the appellees are in this case. Hence the action cannot be sustained or regarded as one having for its object the dissolution of the corporation on the grounds of insolvency or being in imminent danger of insolvency." On the question of the power of the court in the above case the court say: "A court of equity should not ruthlessly wrest from the legally constituted officers of the corporation the management of its affairs and the property of the corporation and turn it over to the hands of a receiver. Such power should not be exercised by the court of equity except with due care and in a case where it is clearly made to appear that it is for the best interests of the parties interested."

pose of bridging over temporary financial embarrassments of the corporation and thus the court is made the unwilling instrument, through its receiver, of suspending, for the time being, the entire judicial department of the state or government, as to such corporation. On the other hand, sometimes zealous and unreasonably impatient creditors, for inconsiderable amounts, are willing to utterly ruin and sacrifice the property and business interests of corporations, regardless of the rights of other creditors, or the public interests subserved by such corporations. All these things make it imperative on the part of the court to exercise the greatest judicial caution in the appointment of receivers over corporations, and particularly so where the action involves the management of the corporate business.¹

¹ As a matter of interest in this connection it will be observed that the English Court of Chancery, prior to the act of Parliament known as the Railway Companies Act of 1867, was exceedingly averse to appointing a receiver over a railway corporation, and placing the management of its affairs in his hands, basing its refusal upon the following grounds:

(1) The general disinclination of the court in any case to assume the permanent management of a business or undertaking.

(2) Where Parliament has imposed upon a corporation the power and duty of operating a public highway in the interest of the public, and the company has assumed the duties of a public carrier of passengers and goods, the judicial branch of government should well hesitate in assuming the duties and responsibilities lodged by the lawmaking power in another body of its own selection. The corporation being wholly unable to delegate or transfer the powers and duties conferred upon it, it was thought to be beyond the power of the court to transfer to itself by operation of law the powers and duties

of the corporation, to be performed through the instrumentality of its receiver and agent. *Gardner v. London, C. & D. R. Co.* L. R. 2 Ch. Div. 201.

The appointment of receivers now, however, is regulated by act of Parliament. See 38 and 39 Vict. Chap. 31.

There is no statutory authority in California for the appointment of a receiver to manage the business of a corporation pending an action by a private person to determine his rights in the property of the corporation; and without such authority there is no jurisdiction in the court to make such an appointment. *Fischer v. San Francisco Super. Ct.* 110 Cal. 129.

A court cannot, in the absence of statutory authority, appoint a receiver to manage the business of a corporation pending an action. *Fischer v. San Francisco Super. Ct. supra.*

As to the general power and duty of the court to authorize its receiver to continue business, see *Vanderbill v. Central R. Co.* 43 N. J. Eq. 669; *Moran v. Lydecker*, 27 Hun, 582; *People v. Atlantic Mut. L. Ins. Co.* 15 Hun, 84; *Atty. Gen. v. Atlantic Mut.*

§ 233. Receiver's powers and duties.

The general powers and duties of a receiver have previously been considered and only in so far as such powers and duties relate to the administration of corporate property and assets will they be reconsidered in this connection. As it must frequently happen in receiverships over corporations the court through its receiver is required to take upon itself, pending litigation, the management of the corporate business, and this necessarily results in enlarging the power of the receiver beyond the requirements in ordinary receiverships where his whole duty is the mere custody and safe-keeping of the property and assets until the final order of the court.

(a) POWER TO BORROW MONEY.

A receiver under the direction of the court has the power to borrow money to be expended by him in the necessary repairs of the corporate property,¹ such as a railway, under his control and

L. Ins. Co. 77 N. Y. 886; *Smith v. New York Consol. Stage Co.* 18 Abb. Pr. 420; *Barton v. Barbour*, 104 U. S. 136, 26 L. ed. 674; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Fischer v. Tuolumne County Super. Ct.* 98 Cal. 67; *Eskridge v. Rushworth*, 8 Colo. App. 562.

¹ *Greenwood v. Algeiras R. Co.* [1894] 2 Ch. 205. In this case an action was brought by the debenture holders and stockholders to foreclose, and application was made to borrow £10,000 to be used in repairing damages to the railway by land-slips and other expenses necessary to keep the line open for traffic and to avoid a forfeiture. In *Bank of Montreal v. Chicago, O. & W. R. Co.* 48 Iowa, 518, the order went so far as to authorize the receiver to "put those portions of the said lines already constructed, or partly constructed, in good order and condition," and borrow money and issue certificates therefor. It was held in this case that the power of the receiver should appear in express terms

or possibly by necessary implication, but that the receiver was not authorized to issue certificates for labor not performed or material not furnished.

As to the power to create claims through receivers and make such claims a first lien in precedence of a mortgage, see *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Mittenderger v. Logansport, O. & S. W. R. Co.* 106 U. S. 286, 309, 27 L. ed. 117, 126. Cf. *Moran v. Lydecker*, 27 Hun, 582; and *Stanton v. Alabama & C. R. Co.* 2 Woods, 506. In the last case it appears that it was necessary to borrow money to preserve the road and complete an inconsiderable portion of the road. *Hoover v. Mont Clair & G. L. R. Co.* 29 N. J. Eq. 4; *Morison v. Morison*, 7 DeG. M. & G. 214; *Bright v. North*, 2 Phill. 216; *Jerome v. McCarter*, 94 U. S. 784, 24 L. ed. 186.

The receivers of the property of a railroad acting under an order of court, giving them power "to continue in the possession and management of the property," in good

management, and to make the sum so borrowed a first lien upon the net revenues of the company, and its property, in priority to all other charges or liens. In such case there must be an emergency and the court will not act upon slight grounds.¹

(b) TO PURCHASE ROLLING STOCK.

The jurisdiction of a court of equity having possession in a foreclosure action, through its receiver, of the property of a railroad company, to authorize the creation of debts for rolling stock and other purposes, when in its opinion it is necessary so to do to secure the continued and successful operation of the road and to charge the debts so created as a first lien on the mortgaged property, is firmly established, though formerly a subject of doubt.²

(c) TO MAKE NEEDFUL REPAIRS.

Where a railroad is in the hands of a receiver in a foreclosure proceeding it is not only within the power but the duty of a receiver to make necessary crossings over a railway operated by him.³ In general it may be stated that the receiver has power to

faith borrowed money necessary for its proper and successful management. It was held that the claim of the lender for repayment from earnings of the road while in the receiver's hands was superior to that of a second-mortgage bond holder. *Ex parte Carolina Nat. Bank*, 18 S. C. 289.

¹ The court in *Meyer v. Johnston*, 53 Ala. 287, 337, says: "We are not aware of any principle of law or element of wise policy which would justify such court after so getting possession in laying aside its judicial character and engaging, however hopeful the scheme in the contemplation of unfinished undertakings, and in raising money for this purpose, as the parties themselves could not, namely, by setting up liens which shall displace other and older liens without the consent of the persons to whom they belong." The court recognized, however, the right of the receiver to

borrow money to be reimbursed out of the proceeds of sale when such a course was necessary. Cf. *Kennedy v. St. Paul & P. R. Co.* 2 Dill. 448, 5 Dill. 519; *Hart v. Savannah & O. R. Co.* 10 S. C. 406; *Vilas v. Page*, 106 N. Y. 439.

² *Vilas v. Page*, 106 N. Y. 439, 451; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 29 L. ed. 963; *Woodruff v. Erie R. Co.* 98 N. Y. 609. And see *Railways*, *post*, § 280.

³ *Fort Dodge v. Minneapolis & St. L. R. Co.* 87 Iowa, 389; *Newton v. Chicago, R. I. & P. R. Co.* 66 Iowa, 423; *Gates v. Chicago, St. P. & K. C. R. Co.* 82 Iowa, 528. In *Fort Dodge v. Minneapolis & St. L. R. Co.* *supra*, mandamus proceedings were sustained against a receiver to compel the making of necessary repairs, and this too where the receiver was appointed in a foreign state. See *Railways*, *post*, § 280.

make the ordinary and usual repairs to the premises in his charge without application to the court for that purpose,¹ but if the repairs are extensive or out of the ordinary scope, usual and customary, application should be made for leave, as in passing the accounts objection may be made.

(d) To COMPROMISE.

The receiver of an insolvent corporation upon application to the court may be authorized to compromise disputed and doubtful claims against the company by the allowance of so much of such claims as he may deem just and equitable, if such compromise is deemed expedient and for the best interest of the creditors and shareholders.² And generally he may take such steps in winding up an insolvent corporation as shall be necessary to enable him to secure possession of the assets or their value.³ But the receiver of a national bank will not be authorized to compromise the liability of the stockholders of such bank who have fraudulently put away their property for the purpose of avoiding their liability as stockholders although by such compromise a larger sum can be realized for the fund.⁴

(e) To SUE.

The right of a receiver to sue and recover is, as a rule, measured by the right of the corporation, over whose property he is appointed, to maintain an action. This could not be otherwise for the reason that the appointment does not, in any respect, change the contract relations of the parties as they exist at the time of

¹*Atty. Gen. v. Vigor*, 11 Ves. Jr. 563; *Blunt v. Clitherow*, 6 Ves. Jr. 799; *Thornhill v. Thornhill*, 14 Sim. 600; *Macartney v. Walsh*, Hayes, 29, note. But see *Wyckoff v. Scofield*, 103 N. Y. 680.

²*Re Orton Ins. Co.* 8 Barb. Ch. 642.

³*State v. Commercial & Sav. Bank*, 87 Neb. 174.

⁴*Re California Nat. Bank Stockholders*, 58 Fed. Rep. 88 (see U. S. Rev. Stat. § 5234); In *Re St. Albans First Nat. Bank*, 49 Fed. Rep. 120, it is held that a receiver will not be allowed to accept a proposal to compromise

claims for and against a bank by surrendering all the remaining assets in consideration of money sufficient to make a certain dividend, the claims in favor of the bank appearing to be valid and enforceable to a much greater amount than those against it. A receiver of a national bank on order of a court of record of competent jurisdiction may compound all bad or doubtful debts. U. S. Rev. Stat. § 5234. See *Re Platt*, 1 Ben. 534; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476.

such appointment.¹ And any defense available to a defendant against the corporation in an action by it is equally available

¹ The contract relations remain as before. *Williams v. Babcock*, 25 Barb. 109. The receiver stands in the position of the corporation with no greater rights; he cannot impeach or disaffirm the lawful and authorized acts of the corporation. *Hyde v. Lynde*, 4 N. Y. 387. In an action involving the title to goods purchased by an insolvent the receiver of such insolvent can assert no better claim than the insolvent could. *Head v. Miller*, 45 Minn. 446. He cannot recover property sold on execution before his appointment. *McIrath v. Snure*, 23 Minn. 391. The same defenses available to a stockholder in an action by the company are available to him in an action by the receiver. *Wardle v. Hudson*, 96 Mich. 482; *Vermont & C. R. Co. v. Vermont C. R. Co.* 46 Vt. 792; *Bangs v. Duckinsfield*, 18 N. Y. 597. A receiver has no right of action on an official bond executed by the debtor and his sureties. *Coffin v. Bensedell*, 110 Ind. 417; *Wallace v. Milligan*, 110 Ind. 498. In an action by a receiver of a bank the defendant may set up the fraudulent representations of the bank and want of consideration as well as if suit had been by the bank. *Litchfield Bank v. Peck*, 29 Conn. 384. The insolvency of the company does not enable the receiver to recover under circumstances in which the company could not have maintained a suit, nor to any greater amount. *Savage v. Medbury*, 19 N. Y. 32. The liability of a stockholder is not increased by the insolvency of the company and the appointment of a receiver. *Shaughnessy v. Rensselaer Ins. Co.* 21 Barb. 605; *Scott v. Armstrong*, 146 U. S. 499, 86 L. ed. 1059. *Cl. Blount v. Windley*, 95 U. S. 178,

24 L. ed. 424; *Carr v. Hamilton*, 129 U. S. 252, 32 L. ed. 669; *Scammon v. Kimball*, 92 U. S. 362, 23 L. ed. 483; *Venango Nat. Bank v. Taylor*, 56 Pa. 14; *Hade v. McVay*, 81 Ohio St. 231. A receiver appointed over a corporation succeeds to all the rights of the company, and he alone can maintain an action for the enforcement of such rights. *Davis v. Ladoga Creamery Co.* 128 Ind. 222. But in all such suits he must allege authority to sue from the court appointing him. *Moriarity v. Kent*, 71 Ind. 601; *Harrall v. Kent*, 71 Ind. 602; *Herron v. Vance*, 17 Ind. 595; *Coope v. Bowles*, 28 How. Pr. 10; *Keen v. Breckenridge*, 96 Ind. 69; *Wynn v. Lord Newborough*, 3 Bro. C. C. 88; *Green v. Winter*, 1 Johns. Ch. 60; *Ward v. Swift*, 6 Hare, 312; *Re Merritt*, 5 Paige, 125; *Merritt v. Merritt*, 16 Wend. 405; *Davis v. Sneed*, 33 Gratt. 705; *Swaby v. Dickon*, 5 Sim. 629; *Battle v. Davis*, 66 N. C. 252; *Screen v. Clark*, 48 Ga. 41; *Glenn v. Busey* (D. C.) 8 Cent. Rep. 283, note; but see *Cox v. Volkert*, 86 Mo. 505. Under the Bank Act (chap. 126) a receiver represents not only the corporation but the creditors, and may therefore avoid any conveyance to which the bank is a party, made in fraud of creditors. *Hayes v. Kenyon*, 7 R. I. 186. A receiver has a right to recover for a conversion of goods made prior to his appointment. *Terry v. Bamberger*, 14 Blatchf. 234. By authority of law the receiver acts in the place of the directors, but no title to property is changed. *Willink v. Morris Canal & Bkg. Co.* 4 N. J. Eq. 377; *Van Wagoner v. Paterson Gaslight Co.* 23 N. J. L. 283; *Mitford v. Mitford*, 9 Ves. Jr. 100; *Brown v. Heathcote*, 1 Atk. 162; *Clason v. Morris*, 10 Johns. 540;

against a receiver in an action brought by him.¹ He may, under the direction of the court, sue for and recover any money due the corporation at the time of his appointment,² or contract obligations existing in its favor. With respect to the right of the receiver to maintain an action against the stockholders of the corporation to recover a statutory liability in favor of creditors, no uniform rule can be established. In some cases the receiver has been permitted to maintain such suits in his official capacity as the representative of the creditors.³ While in other cases such

Murray v. Lyburn, 2 Johns. Ch. 443; *Moiss v. Chapman*, 24 Ga. 249; *Cox v. Volkert*, 86 Mo. 505.

¹ The debtor of an insolvent corporation has the same equitable right of set-off against a claim of the receiver that he had against the corporation, but no right to a judgment against the receiver. *Van Wagoner v. Paterson Gaslight Co.*, 28 N. J. L. 283; *Cumberland Bank v. Hann*, 18 N. J. L. 322; *Ryall v. Larkin*, 1 Wils. 155, Buller's N. P. 181; *McDonald v. Webster*, 2 Mass. 498; *Colt v. Brown*, 12 Gray, 233. The remedy of set-off has been much enlarged in equity. Thus at law a joint demand cannot be set off against a general one, nor a general demand against a joint one; but equity adopts a different rule where, on account of the insolvency of one of the parties, the other is in danger of losing his claim. Generally equity will enforce the right of set-off. *Armstrong v. Warner*, 49 Ohio St. 376, 17 L. R. A. 466; *Louis Snyders' Sons Co. v. Armstrong*, 37 Fed. Rep. 18; *Yardley v. Olothier*, 49 Fed. Rep. 337; *State Bank at New Brunswick v. Bank of New Brunswick*, 3 N. J. Eq. 266.

² Inasmuch as the rights of the corporation to sue are suspended during the pendency of the receivership, the receiver is the only person who can sue to enforce the rights of the corporation. *Davis v. Ladoga Creamery*

Co. 128 Ind. 223. He must, however, do everything which the corporation would be required to do as a condition precedent to the institution of a suit. *Hayes v. Kenyon*, 7 R. I. 136. He has authority independent of the statute to sue for all moneys due the company, and for all property improperly disposed of in violation of the rights of either creditors or stockholders. *Osgood v. Laytin*, 48 Barb. 463. He may return property obtained by the corporation on conditional contracts where the company has become unable to pay its current debts in the ordinary course of business, on complying with the terms of the contract. *Sunflower Oil Co. v. Wilson*, 142 U. S. 818, 85 L. ed. 1025.

³ The court, in *Calkins v. Atkinson*, 2 Lans. 12, held that a receiver of an insolvent corporation may maintain a suit in equity against the stockholders to enforce their stock liability to creditors, and may restrain the creditors from prosecuting such suits, on the authority of *Story v. Furman*, 25 N. Y. 214. Such suit is several and not joint. *Rankine v. Elliott*, 16 N. Y. 377; *Aspinwall v. Torrance*, 1 Lans. 381. See *contra*, *Mathis v. Pridham*, 1 Tex. Civ. App. 58.

In *Stephens v. Bernays*, 41 Fed. Rep. 401, it was held that the receiver might maintain a suit for stock liability against a stockholder of a national

actions are prosecuted by the creditors themselves.' When a receiver has been appointed in a suit to reach concealed assets or misappropriated property suit may be brought by the receiver, and not by creditors;² and when the receiver is applied for

bank. *Schoonover v. Hinckley*, 48 Iowa, 82. In *McDonald v. Ross-Lewin*, 29 Hun, 87, in an action to dissolve an insurance company, it was held that a receiver may assess the members for unassessed losses and bring separate actions against each member to recover the assessment.

The regularity, propriety, and validity of the appointment of a receiver of an insolvent corporation under Minn. Gen. Stat. 1894, § 5897, cannot be collaterally attacked in a proceeding by him to enforce the collection of a call on unpaid subscriptions. *Basting v. Ankeny* (Minn.) 66 N.W. 286.

¹In *Wincock v. Turpin*, 96 Ill. 185, suit in equity was brought by a receiver of a bank and a depositor against the stockholders of a savings bank to enforce their stock liability and to restrain individual depositors from prosecuting suits at law, and it was held that whenever a statute creates a liability, it is a liability at law unless equitable jurisdiction is given by the statute, and where the statute makes the liability to depositors they alone may sue, and the receiver has no right. The court says, however: "It may be a state of facts might exist which would authorize a court of equity to bring before it all the stockholders and depositors and determine their rights and adjust equities, marshal the fund and distribute it *pro rata*." As to the remedy being at law, see *Culver v. Third Nat. Bank*, 64 Ill. 528; *Corwith v. Culver*, 69 Ill. 502; *Tibbals v. Libby*, 87 Ill. 142;

Arenz v. Weir, 89 Ill. 25; *McCarthy v. Lavasche*, 89 Ill. 270; *Fuller v. Ledden*, 87 Ill. 310.

And in *Tibbals v. Libby*, and *Arenz v. Weir*, *supra*, the fact that a receiver had been appointed, it was held, did not change the rights of a creditor to sue and recover stock liability. As to equitable jurisdiction in such a case, see *Emmes v. Doris*, 102 Ill. 350, where it is held that if the liability constitutes a common fund for the benefit of all creditors, then a suit in equity will be sustained, on the authority of *Merchants' Bank v. Stevenson*, 5 Allen, 401; *Orease v. Babcock*, 10 Met. 532; *Briggs v. Penniman*, 8 Cow. 887; *Horner v. Henning*, 93 U. S. 228, 23 L. ed. 879; *Low v. Buchanan*, 94 Ill. 81; *Harper v. Union Mfg. Co.* 100 Ill. 225. In some cases it has been held that the liability is concurrent, by suits at law or in equity. *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Van Hook v. Whitlock*, 8 Paige, 409; *Norris v. Johnson*, 34 Md. 485; *Perry v. Turner*, 55 Mo. 418; *Adkins v. Thornton*, 19 Ga. 325.

In *Wallace v. Milligan*, 110 Ind. 498, it was held that the individual liability of a member of a partnership was not a firm asset, and in the absence of a statute a receiver of the firm has no right to enforce such liability; that the right exists alone in the creditors. Cf. *Republic L. Ins. Co. v. Swigert*, 185 Ill. 150, 12 L. R. A. 328; *Jacobson v. Allen*, 20 Blatchf. 525; *Farnsworth v. Wood*, 91 N. Y. 808; *Ouykendall v. Corning*, 88 N. Y. 129.

²*South Bend Toy Mfg. Co. v. Pierre Fire & M. Ins. Co.* 4 S. D. 178.

partly by reason of the insolvency of the corporation he may maintain a summary proceeding entitled in the original action to compel officers of the corporation to surrender assets which they are charged with concealing.¹ He may institute proceedings to

¹ *Brandt v. Allen*, 76 Iowa, 50, 1 L. R. A. 653.

The fact that the property of a corporation has passed into the hands of a receiver does not bar or abate a suit against the corporation to recover a demand against it. He can be made a party by personal application therefor. *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 190.

The provisions of the New York Revised Statutes authorizing the receivers of an insolvent corporation to sue for and recover any sum due upon any share of capital stock, is a cumulative remedy merely. *Mann v. Currie*, 2 Barb. 294.

The receivers of an insolvent corporation may maintain an action against stockholders and creditors of the company to recover from the stockholders a dividend declared on its capital stock, and received by them, where the complaint avers that such dividend impaired the capital; that some of the defendants as creditors are suing stockholders to secure from them such dividends; and that the funds so misappropriated are required to pay the debts of the corporation. *Osgood v. Laytin*, 48 Barb. 463.

A receiver of a railroad is as much entitled to recover moneys due upon contracts made with the railway company as with himself. *Sunflower Oil Co. v. Wilson*, 142 U. S. 813, 35 L. ed. 1025.

A receiver in a mortgage foreclosure against a corporation is a mere custodian of the mortgaged property and other property of the corporation. *Harland v. Bankers & M. Teleg. Co.* 33 Fed. Rep. 305.

A suit in equity by a receiver of an insolvent corporation lies against the stockholders and creditors of the corporation, for an accounting of the demands due to the creditors; to ascertain the individual liability of any of the stockholders; to compel payment from the various stockholders of such sums as might be due from them towards a fund for the payment of the creditors, and meantime to restrain the creditors from bringing separate suits on the individual liability of the stockholders. All equities may be settled in the one action. *Calkins v. Atkinson*, 2 Lans. 12.

A receiver of an insolvent corporation has no power to enforce statutory liability of the stockholders, in the absence of a statute so authorizing him. *Wallace v. Milligan*, 110 Ind. 498.

In an action by a receiver to recover from a stockholder an assessment upon his unpaid stock, the latter cannot set up as a defense fraud in procuring the appointment of the receiver, or the claim that the corporation is not indebted, these matters being adjudicated in the action resulting in the appointment of the receiver. *Schoonover v. Hinckley*, 48 Iowa, 82.

The question whether the receiver of a mutual benefit society should have special leave granted to bring an action against any of its officers, where such question depends upon facts and circumstances not sufficiently presented in his report, will be left to the determination of a single justice upon special application therefor, and will not be determined on a bill by the receiver for instruc-

charge officers and directors for a breach of trust,¹ and may impeach the fraudulent conveyances of the corporation,² or its *ultra vires* acts.³

(f) To REDEEM.

The receiver of the corporate property which has been sold under a mortgage foreclosure, where a right of redemption exists, has a right to redeem from such sale where such right existed in the mortgagor,⁴ but if the redemption would not be advantageous to the estate he probably would not be compelled to do so.⁵

(g) To PAY TAXES.

Owing to the nature of the ordinary tax lien, and the interest of the public in the payment of general taxes, the receiver has

tions as to the distribution of the corporate assets. *Fogg v. Supreme Lodge, U. O. of G. L.* 159 Mass. 9. The date of filing the bill fixes the rights of parties.

In an action by a receiver against the corporate officers to recover converted assets, it is no defense that such assets are not needed for the payment of debts. *McCarty's Appeal*, 110 Pa. 879.

The receiver appointed in equity to foreclose a mortgage on a railroad cannot maintain a suit to recover earnings of the road before his appointment. *Noyes v. Rich*, 52 Me. 115.

¹The receiver in his official position has an undoubted right to institute proceedings against directors and officers, for losses sustained by the corporation, through breaches of trust. *Bank of Niagara v. Johnson*, 8 Wend. 645; *Butterworth v. O'Brien*, 39 Barb. 192; *Hayes v. Kenyon*, 7 R. I. 186; *Gillet v. Phillips*, 18 N. Y. 114; *Re National Funds Assur. Co.* L. R. 10 Ch. Div. 118.

In such case he is the representa-

tive of all the creditors, and not particular creditors. He represents creditors *ut universi* and not *ut singuli*. *Lacombe v. Milliken*, 86 La. Ann. 387; *Raymond v. Palmer*, 85 La. Ann. 276.

²*Whittlesey v. Delaney*, 73 N. Y. 571; *Tuckerman v. Brown*, 33 N. Y. 297; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Gillet v. Phillips*, 18 N. Y. 114; *Bostwick v. Menck*, 40 N. Y. 388; *McLaren v. Milwaukee First Nat. Bank*, 76 Wis. 491; *Hamilton v. Wright*, 23 Wis. 491; *Ilaben v. Harshaw*, 49 Wis. 379; *Viles v. Bangs*, 36 Wis. 181; *Alexander v. Relfe*, 74 Mo. 495; *Weston v. Loyhed*, 30 Minn. 221; *Schmidlapp v. Currie*, 55 Miss. 597; *Farwell v. Metcalf*, 63 N. H. 276; *Hurt v. Clarke*, 56 Ala. 19; *Huiskamp v. Moline Wagon Co.* 121 U. S. 810, 30 L. ed. 972.

³*Vail v. Hamilton*, 85 N. Y. 453.

⁴*Casserly v. Witherbee*, 119 N. Y. 522; *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178.

⁵*Re Oak Pits Colliery Co.* L. R. 21 Ch. Div. 322; *Com. v. Franklin Ins. Co.* 115 Mass. 278.

power and it is his duty to pay the taxes on the receivership property.¹

(h) To LEASE.

Independent of statutory power, or express authority from the court a receiver has no power to lease the receivership property.²

(i) To MORTGAGE.

Under the authority and direction of the court where it is necessary to preserve the receivership property, the receiver may mortgage the receivership property.³ He may also borrow money under like circumstances even against the objection of the leaseholders.⁴

(j) To INVEST.

The ordinary receiver *pendente lite* has no power to invest or loan the receivership funds, and the exercise of such power is a breach of trust.⁵

¹*Hopkins v. Taylor*, 87 Ill. 486; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 484, 29 L. ed. 963; *Central Trust Co. v. New York C. & N. R. Co.* 110 N. Y. 250, 1 L. R. A. 260; *Philadelphia & R. R. Co. v. Com.* 104 Pa. 80. But see as to taxes assessed upon the shares of a corporation, *Lionberger v. Rouse*, 43 Mo. 67; *Relfe v. Columbia L. Ins. Co.* 11 Mo. App. 374.

As to the power to enforce the payment of a franchise tax against a corporation in the hands of a receiver, see *Com. v. Lancaster Sav. Bank*, 123 Mass. 493; *Georgia v. Atlantic & G. R. Co.* 3 Woods, 434.

²*McMinville & M. Railroad v. Hug-gins*, 8 Baxt. 177; *State v. McMinville & M. Railroad*, 6 Lea, 369; *Chicago Deposit V. Co. v. McNulta*, 153 U. S. 554, 38 L. ed. 819.

³*Burroughs v. Gaither*, 66 Md. 171; *Raht v. Attrill*, 106 N. Y. 423.

⁴*Hanna v. State Trust Co.* 70 Fed. Rep. 2, 2 Am. & Eng. Corp. Cas. N. S. 448; *Raht v. Attrill*, 106 N. Y. 423. The court in *Re Regent's Canal Iron-*

works Co. L. R. 3 Ch. Div. 411, 427, say: "There must be something approaching a demonstrable necessity to justify an infringement of the rights of the mortgagees." It requires a strong case to be made before the court will disturb contract rights of lienholders by subordinating such liens to liens for borrowed money. *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* 50 Fed. Rep. 481, 16 L. R. A. 603; *Laughlin v. United States Rolling-Stock Co.* 64 Fed. Rep. 25; *Fidelity Ins. T. & S. D. Co. v. Roanoke Iron Co.* 68 Fed. Rep. 623; *Snively v. Loomis Coal Co.* 69 Fed. Rep. 204; *Hooper v. Central Trust Co.* 81 Md. 559. Cf. *Wallace v. Loomis*, 97 U. S. 148, 24 L. ed. 895; *Friedick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 674; *Mittenderger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488.

⁵*Utica Ins. Co. v. Lynch*, 11 Paige, 520. But see *Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 94.

(k) To CONTRACT.

The receiver, being authorized by the court in the general or a special order, has power to contract, and a receiver of a railroad company who is made manager thereof has implied power to make such reasonable contracts as are necessary to the proper management of the trust.¹

(l) To SELL.

A sale made in strict conformity to the terms prescribed by the order or decree of court will not, as a general rule, be set aside unless it plainly appears that the property was sold for an inadequate price, or unless there has been a mistake or surprise of some kind, or an omission of duty, or misconduct, or fraud on the part of the receiver, or fraud on the part of the purchaser. What will be sufficient to justify the court in refusing confirmation of a sale depends on the facts and circumstances of each particular case.² The purchaser at a receiver's sale acquires no title to the property until the sale has been ratified by the court.³ A receiver in making a sale retains a lien on the property for any unpaid balance of the purchase money.⁴ The court may, as a condition, order the property to be sold at not less than a given price.⁵ There is no warranty of title, express or implied, in a receiver's sale, and the purchaser takes only the title which the corporation had to the property. The general doctrine applicable to trustees applies to receiverships which prevents the receiver on the grounds of public policy from becoming a purchaser at his own sale.⁶

¹*Jourdan v. Long Island R. Co.* 6 N. Y. S. R. 89; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 52 Fed. Rep. 908.

A receiver represents and stands in the place of the corporation and can enforce only such contracts and rights as the corporation could enforce. *Greene v. Sprague Mfg. Co.* 52 Conn. 330; *Russell v. Bristol*, 49 Conn. 251; *Cooper v. Bowles*, 42 Barb. 87.

²*Belford v. Mancatty* (Md.) 2 Am. & Eng. Corp. Cas. N. S. 477. In such cases the sales are made by the court through the receiver as its agent and

are made in the interests of all parties concerned.

³See preceding notes, and preceding case as to what constitutes defective notice of sale and other requisites of such notice. Cf. *Atty. Gen. v. Continental L. Ins. Co.* 94 N. Y. 199.

⁴*Florida v. Anderson*, 91 U. S. 667, 23 L. ed. 290; *State v. Jacksonville, P. & M. R. Co.* 16 Fla. 708.

⁵*McIlhenny v. Bins*, 80 Tex. 1.

⁶*Jewett v. Miller*, 10 N. Y. 402; *Herrick v. Miller*, 123 Ind. 304; *Titherington v. Hodge*, 81 Ky. 286.

(m) TO MAKE ASSESSMENTS.

The court may make an assessment after the appointment of a receiver for an insolvent mutual fire insurance company, and order the same to be levied upon both deposit and premium notes for the proportionate share of losses and expenses which occurred during the term of insurance, and such assessments may cover interest, possible losses by reason of uncollectible assessments, and a sufficient amount to compensate the receiver and pay all expenses.¹

¹ *Davis v. Shearer*, 90 Wis. 250; *Davis v. Parcher*, 82 Wis. 495; *Jones v. Lisson*, 6 Gray, 296; *Com. v. Massachusetts Mut. F. Ins. Co.* 112 Mass. 116; *Wardle v. Townsend*, 75 Mich. 385, 4 L. R. A. 511; *Savage v. Medbury*, 19 N. Y. 84; *People's Equitable Mut. F. Ins. Co. v. Babbitt*, 7 Allen, 235; *Traders' Mut. F. Ins. Co. v. Stone*, 9 Allen, 483; *Parker v. Stoughton Mill Co.* 91 Wis. 174.

In such case the decree making the assessment is conclusive on the members or policy holders of the defunct company unless attacked in a direct proceeding, notwithstanding they are not present when the decree is rendered. *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 185; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 211; *Rand, McN. & Co. v. Mutual F. Ins. Co.*, *Parker*, 58 Ill. App. 528; *Parker v. Stoughton Mill Co.* 91 Wis. 174; *Great Western Teleg. Co. v. Burnham*, 79 Wis. 47.

A court appointing a receiver of a mutual insurance company exercises at its discretion the power of the board of directors of such a company, as well as the additional authority conferred by statute. *Rand, McN. & Co. v. Mutual F. Ins. Co.*, *Parker*, 58 Ill. App. 528.

The propriety of the amount of an assessment ordered by the court appointing a receiver of an insolvent insurance corporation cannot be ques-

tioned, in an action by the receiver to collect the assessment. *Rand, McN. & Co. v. Mutual F. Ins. Co.*, *Parker*, *supra*.

An order authorizing a receiver of a mutual insurance company to levy an assessment equal in amount to all other assessments theretofore made does not include penalties on other assessments, but is limited to the amounts of the assessments themselves. *Capital City Mut. F. Ins. Co. v. Boggs*, 173 Pa. 91.

An order authorizing a receiver of a mutual insurance company, appointed on the relation of the attorney general, to make a specified assessment, is conclusive upon a policy holder as to the validity and the amount of the assessment, but not as to the liability to pay, so far as it depends upon matters personal to himself. *Capital City Mut. F. Ins. Co. v. Boggs*, *supra*.

The receiver in insolvency of a building association is the proper person to ascertain the amount of losses of the association, and make an assessment on the members to meet the same. *Eversmann v. Schmitt*, 53 Ohio St. 174, 29 L. R. A. 184.

As to the power and method of making assessments in mutual fire insurance matters, see *Davis v. Shearer*, 90 Wis. 250.

Where the assessment is based on a subscription procured by fraudulent

(n) DUTY TO APPEAL.

It is not the duty of a receiver of an insolvent corporation to take an appeal in the interest of one set of stockholders against the interest of another set of stockholders.¹

§ 234. Liability of receiver.

(a) ON HIS CONTRACTS.

The contracts of a receiver are in all cases to be made upon the general or express orders of the court and are, in effect, the contracts of the court made through the agency of the receiver. This being the case, the court will in all cases see that these contracts are performed, and it is not material that they may subsequently appear to have been improvidently made.² He is also liable for the loss of funds placed by him in a bank, where the bank fails during the period of deposit.³ It would seem, how-

representations, see *Howard v. Turner*, 155 Pa. 349.

The statute of limitations does not commence to run until an assessment has been made. *Re Slater Mut. F. Ins. Co.* 10 R. I. 42; *Bigelow v. Libby*, 117 Mass. 359; *Smith v. Bell*, 107 Pa. 352; *Wardle v. Hudson*, 96 Mich. 432.

It has been held the power to make an assessment of this nature does not depend upon an order of court but upon the facts forming the basis of the assessment. The court sanctions and directs the receiver to act and in doing so he acts in a ministerial capacity. *Downs v. Hammond*, 47 Ind. 131; *Manlove v. Burger*, 38 Ind. 211; *Bangs v. Duckinfield*, 18 N. Y. 592; *Sands v. Sweet*, 44 Barb. 108; *Thomas v. Whalton*, 31 Barb. 172; *Wardle v. Townsend*, 75 Mich. 385, 4 L. R. A. 511. Cf. *Davis v. Purcher*, 82 Wis. 488.

As to necessary allegations in establishing a case for an assessment, see *Williams v. Babcock*, 25 Barb. 109; *Jackson v. Roberts*, 31 N. Y. 304; *Sands v. Sanders*, 28 N. Y. 416; *Bangs v. Duckinfield*, 18 N. Y. 592.

¹ *Strauss v. Carolina Interstate Bldg. & L. Assn.* (N. C.) 24 S. E. 116.

² *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 260; *Re United States Rolling-Stock Co.* 57 How. Pr. 16; *Texas & St. L. R. Co. v. Rust*, 17 Fed. Rep. 275. A receiver of a railroad, until the contrary is shown, will be presumed to have authority to make contracts granting special transportation rates. *Bayles v. Kansas P. R. Co.* 13 Colo. 181, 5 L. R. A. 480.

The failure to obtain an order of the court for a contract by a receiver will not defeat liability on the contract, where the work under it is directed to be done by the court without any formal order, and the validity of a claim thereon subsequently declared by the court, with full knowledge of the facts. *Girard L. Ins. A. & T. Co. v. Cooper*, 162 U. S. 529, 40 L. ed. 1062; *Wabash, St. L. & P. R. Co. v. Central Trust Co.* 22 Fed. Rep. 269; *Jay v. DeGroot*, 2 Hun. 205.

³ *Ricks v. Broyles*, 78 Ga. 610; *State, Collins, v. Gooch*, 97 N. C. 186. See also *Knight v. Plymouth*, 1 Dick. 120.

ever, that this rule is too harsh where the receiver exercises care in the selection of a bank of deposit. In the very nature of things a receiver is not supposed to have facilities for the safe keeping of the funds adequate to his demands in many cases. Besides it would not be in accordance with the ordinary custom of prudent business men. In all cases the bank should be designated by the court, that the receiver may have proper protection against loss. Money deposited with a corporation in trust does not pass to the receiver of the corporation, and he does not become liable therefor.¹

¹*Importers' & T. Nat. Bank v. Petors*, 123 N. Y. 272; *People v. American Loan & T. Co.* 2 App. Div. 193; *People v. City Bank*, 96 N. Y. 32; *Arnot v. Bingham*, 55 Hun, 553; *People v. American Loan & T. Co.* 37 N. Y. Supp. 780; *People v. Bank of Danville*, 39 Hun, 187; *Chase v. Petroleum Bank*, 66 Pa. 169; *Kinsela v. Cataract City Bank*, 18 N. J. Eq. 159; *Peak v. Ellicott*, 30 Kan. 156; *Kinney v. Paine*, 68 Miss. 258. The trust relationship must be established, however. *Jones v. Kilbreth*, 49 Ohio St. 401; *Anheuser-Busch Brew. Asso. v. Morris*, 36 Neb. 81; *Griffin v. Chase*, 36 Neb. 328; *Kimball v. Gafford*, 78 Iowa, 65.

It has been held, however, that where a trust relationship is not established between the claimant and the corporation, and no fraud is shown, the property or its proceeds must be traced to the hands of the receiver, and if this is not done the simple relation only of debtor and creditor exists. *Atkinson v. Rochester Printing Co.* 114 N. Y. 168; *People v. Mechanics' & T. Sav. Inst.* 92 N. Y. 7; *People v. Merchants' & M. Bank*, 78 N. Y. 269; *Butler v. Sprague*, 66 N. Y. 392; *Sherwood v. Milford State Bank*, 94 Mich. 78; *Re North River Bank*, 60 Hun, 91; *New York Breweries' Co. v. Higgins*, 79 Hun, 250; *Grant v.*

Walsh, 81 Hun, 449; *Moore v. Williams*, 62 Hun, 55; *Akin v. Jones*, 93 Tenn. 353, 25 L. R. A. 523; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 87 L. ed. 363; *Anheuser-Busch Brew. Asso. v. Clayton*, 56 Fed. Rep. 759; *Booth v. Wells*, 42 Fed. Rep. 11; *Southern Development Co. v. Houston & T. C. R. Co.* 27 Fed. Rep. 344; *First Nat. Bank v. Davis*, 114 N. C. 343; *Commercial & F. Nat. Bank v. Davis*, 115 N. C. 226; *McLain v. Wallace*, 108 Ind. 562; *Freiberg v. Stoddard*, 161 Pa. 359; *Re Lebanon Trust & S. D. Bank's Assigned Estate*, 166 Pa. 622; *Wilson v. Coburn*, 35 Neb. 530; *Billingsley v. Pollock*, 69 Miss. 759; *Louisville Bkg. Co. v. Paine*, 67 Miss. 678; *Otis v. Gross*, 96 Ill. 612.

The ordinary bank depositor is a simple contract creditor. *People v. St. Nicholas Bank*, 77 Hun, 159; *People v. Mechanics' & T. Sav. Inst.* 92 N. Y. 7.

The character of the depositor does not change the relationship of the parties, as where the court makes a deposit (*Otis v. Gross*, *supra*), or a city or county. *Multnomah County v. Oregon Nat. Bank*, 61 Fed. Rep. 912; *Spokane County v. Clark*, 61 Fed. Rep. 538; *Re Plankinton Bank*, 87 Wis. 378.

(b) FOR RENT.

The receiver will be liable for the rent of all leasehold premises taken possession of and retained by him, but he has an election, as we have elsewhere seen, whether he will retain such premises and pay the rents according to the covenants, and has a reasonable time in which to make such election.¹ If it is seen that the leasehold is beneficial to the estate the court may properly authorize the receiver to retain the property. On the contrary, if the leasehold, at the stipulated rental, is not beneficial to the estate the court will order the lessor to retake his property unless he is willing to make the rentals such as the estate can afford to pay.² If the receiver retains the leased property he is bound to pay the

¹*Re Oak Pits Colliery Co.* L. R. 21 Ch. Div. 322; *Re Brown, Bayley, & Dixon*, L. R. 18 Ch. Div. 649; *People v. Universal L. Ins. Co.* 80 Hun, 142; *Woodruff v. Erie R. Co.* 98 N. Y. 609; *Com. v. Franklin Ins. Co.* 115 Mass. 278. See *Mittenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Turner v. Indianapolis, B. & W. R. Co.* 8 Biss. 527; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 46 Fed. Rep. 156; *Stockton v. Mechanics' & L. Sav. Bank*, 52 N. J. Eq. 163; *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 34 L. ed. 379; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632; *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 36 L. ed. 640; *Gaither v. Stockbridge*, 67 Md. 222. See *People v. National Trust Co.* 82 N. Y. 288.

Permission of a receiver for the temporary occupation of property leased to the corporation will not constitute an adoption of the lease by the receiver so as to bind the assets in his hands. *Tradesman's Pub. Co. v. Knoxville Car-Wheel Co.* 95 Tenn. 634, 31 L. R. A. 593.

²*Woodruff v. Erie R. Co.* 98 N. Y. 609; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197; *Meyer v. West-*

ern Car Co. 102 U. S. 1, 26 L. ed. 59; *Brown v. Toledo, P. & W. R. Co.* 85 Fed. Rep. 444; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 34 Fed. Rep. 259; *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 42 Fed. Rep. 6; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 58 Fed. Rep. 257; *Thomas v. Western Car Co.* 149 U. S. 96, 37 L. ed. 668; *Clyde v. Richmond & D. R. Co.* 68 Fed. Rep. 21. See *Day v. Postal Teleg. Co.* 66 Md. 354; *People v. Universal L. Ins. Co.* 80 Hun, 142; *Dawson Mfg. Co. v. Brunswick & A. R. Co.* 51 Ga. 186.

Coe v. New Jersey M. R. Co. 27 N. J. Eq. 37, 30 N. J. Eq. 21. Where a contract of an insolvent corporation is not of such nature that the corporation could have been compelled to specifically perform it a receiver has a right to terminate it where it is to the interest of creditors. *Scott v. Rainer Power & R. Co.* 13 Wash. 108, 2 Am. & Eng. Corp. Cas. N. S. 401.

The appointment of a receiver of a corporation at the instance of a creditor does not release it from a contract for the employment, at a fixed price, of officers for a year, beginning at the date upon which the receiver was ap-

contract rental unless otherwise changed, if the rentals are not exorbitant.¹

(c) FOR INTEREST.

A receiver will be liable for interest upon the receivership fund in his hands if he uses the same for his own personal benefit.²

(d) FOR DEBTS INCURRED.

A receiver is not personally liable for debts or damages incurred in the management of the receivership property, but only

pointed. *Lenoir v. Linville Improv. Co.* 117 N. C. 471.

The lessor of premises to a bank for a specified term under a lease authorizing him to relet the premises as agent of the bank if they become vacant during the term for nonpayment of rent or otherwise may recover from a receiver in insolvency of such bank the difference between the agreed rent and that obtained by the lessor from one to whom he relet the premises after nonpayment of rent. *People v. St. Nicholas Bank*, 3 App. Div. 544.

Receivers who permit work on a building which was in course of erection when the receivership commenced, to continue without interruption, may be liable for the work so done according to the terms of the contract under which it was done. *Girard L. Ins. A. & T. Co. v. Cooper*, 163 U. S. 529, 40 L. ed. 1062.

A claim presented to the receiver of an insolvent corporation for rent of premises, held by the corporation under a lease for a term of years, accruing after the insolvency of the corporation, should be allowed, and paid *pro rata* with claims of other creditors. *Chicago Fire Place Co. v. Tait*, 58 Ill. App. 293.

A lessor of a banking room for a term of years to a national bank can recover from the bank or its receiver

for rent due, under the lease, subsequent to the insolvency of the bank, and after the receiver has abandoned the leased property. *Hartford Deposit Co. v. Chemical Nat. Bank*, 58 Ill. App. 256; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632. But see *Fidelity Safe Deposit & T. Co. v. Armstrong*, 35 Fed. Rep. 567; *Deane v. Caldwell*, 127 Mass. 242; *United States v. Knox*, 111 U. S. 784, 28 L. ed. 603.

¹*Peoria & P. U. R. Co. v. Chicago, P. & S. W. R. Co.* 127 U. S. 200, 32 L. ed. 110; *Thomas v. Peoria & R. I. R. Co.* 36 Fed. Rep. 803; *Brown v. Toledo, P. & W. R. Co.* 35 Fed. Rep. 444.

²*Schwartz v. Keystone Oil Co.* 153 Pa. 283. "It was error, plainly, to charge the receiver interest, as he is not chargeable with it as of course, but only under special circumstances, to be shown by him who would charge him." *Crawford v. Fickey* (W. Va.) 2 Am. & Eng. Corp. Cas. N. S. 417; *Richardson v. Hoyt*, 60 Iowa, 70; *Radford v. Folsom*, 55 Iowa, 276; *Daniel v. Wharton*, 90 Va. 584; *Darby v. Gilligan*, 87 W. Va. 59; *Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 107; *Re Com. F. Ins. Co.* 33 Hun, 78; *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Hinckley v. Gilman, O. & S. R. Co.* 100 U. S. 158, 25 L. ed. 591.

for personal misconduct or neglect.¹ He has no right, however, to make unauthorized contracts and thereby bind the trust, and if he does so he will be personally liable.²

(e) PERSONAL LIABILITY FOR TORTS.

As a rule the receiver is not personally liable for the injuries and damages caused by his agents, employees, and servants, except where the wrong can be imputed to him personally,³ or where he commits a wrongful act outside of the scope of his authority,⁴ or beyond the jurisdiction of the court appointing him.⁵

(f) OFFICIAL LIABILITY FOR TORTS AND DAMAGES.

The receiver, however, is liable, in his official capacity, for damages caused by the negligence of his agents and employees in the management of the receivership property.⁶ The scope of liability of the receiver in such case is, as a rule, measured by the scope of the liability of the corporation itself under similar circumstances.⁷ In case of a railroad, while the receiver is exer-

¹ *Texas & P. R. Co. v. Cox*, 145 U.S. 593, 36 L. ed. 829; *McNulta v. Lockridge*, 141 U. S. 327, 35 L. ed. 796; *Davenport v. Alabama & C. R. Co.* 2 Woods, 519; *Re Home Provident Safety Fund Assn.* 129 N. Y. 288; *Farmers Loan & T. Co. v. Central R. Co.* 2 McCrary, 181; *Vilas v. Page*, 106 N.Y. 439; *Hopkins v. Connel*, 2 Tenn. Ch. 823; *Cardot v. Barney*, 63 N. Y. 281; *Davis v. Duncan*, 19 Fed. Rep. 477; *Woodruff v. Jewett*, 37 Hun, 205, 115 N. Y. 267; *Thompson v. Scott*, 4 Dill. 508; *Eddy v. Powell*, 49 Fed. Rep. 814; *Vanderbilt v. Central R. Co.* 43 N. J. Eq. 669.

² *Rogers v. Wendell*, 54 Hun, 540; *Ryan v. Rand*, 20 Abb. N. C. 313. Cf. *New v. Nicoll*, 73 N. Y. 127.

³ *Meara v. Holbrook*, 2 Ohio St. 187.

⁴ *Curran v. Craig*, 23 Fed. Rep. 101.

⁵ *Kain v. Smith*, 80 N. Y. 458.

⁶ *Little v. Dusenberry*, 46 N. J. L. 614; *Cardot v. Barney*, 63 N. Y. 281; *Lyman v. Central Vermont R. Co.* 59 Vt. 167; *Meara v. Holbrook*, 20 Ohio

St. 187; *Davis v. Duncan*, 19 Fed. Rep. 477; *Erwin v. Davenport*, 9 Heisk. 45; *Thornton v. Highland Ave. R. Co.* 94 Ala. 353; *Blumenthal v. Brainard*, 88 Vt. 402; *Newell v. Smith*, 49 Vt. 255; *Paige v. Smith*, 99 Mass. 395; *Ryan v. Hays*, 62 Tex. 42.

⁷ *Central Trust Co. v. Sloan*, 65 Iowa, 655; *Sloan v. Central Iowa R. Co.* 62 Iowa, 728; *Fullerton v. Fordyce*, 121 Mo. 1; *Melendy v. Barbour*, 78 Va. 544; *Pope's Case*, 30 Fed. Rep. 169; *Winbourn's Case*, 30 Fed. Rep. 167; *Davis v. Duncan*, 19 Fed. Rep. 477; *Ex parte Brown*, 15 S. C. 518; *Meara v. Holbrook*, 20 Ohio St. 187; *Klein v. Jewett*, 26 N. J. Eq. 474; *Cowdrey v. Galveston, H. & H. R. Co.* 93 U. S. 352, 23 L. ed. 950; *Little v. Dusenberry*, 46 N. J. L. 614; *Holbrook v. American F. Ins. Co.* 6 Paige, 220; *Brown v. Brown*, 71 Tex. 355; *Brown v. Wabash R. Co.* 96 Ill. 297. But see *Henderson v. Walker*, 55 Ga. 481; *Campbell v. Cook*, 86 Tex. 630; *Turner v. Cross*, 83 Tex. 218, 15 L. R. A. 262; *Texas & P. R.*

eising the franchises of the company and operating the road in his official capacity, he is subject to the same rules of liability as apply to the company itself when it is in the exercise of said franchises.¹

The general liability of the receiver in his official capacity for the contracts and torts of a corporation which antedate the receiver's appointment and where the corporation has been dissolved, is determined in various ways in different courts, according to the equities and priorities of the claimants and the practice of the courts. As the receiver cannot be compelled to complete the contracts of the corporation it follows that he, in his official capacity, cannot be made liable in damages for nonfulfillment.²

(g) EXTENT OF LIABILITY.

As a rule, the receiver's rights and liabilities are coextensive with the rights and liabilities of the corporation over whose property he is appointed, except where the corporation has committed acts in violation of law and in fraud of creditors. In which case it must clearly appear that he has a right to act in behalf of creditors to repudiate the acts complained of.³

(h) LIABILITY FOR LOSS IN MANAGEMENT.

A receiver is not liable for loss in the management of business of which he has charge as receiver, unless the loss grows out of

Co. v. Cox, 145 U. S. 593, 36 L. ed. 829.

¹ *McNulta v. Lockridge*, 187 Ill. 270; *McNulta v. Ensich*, 184 Ill. 46. Proceedings against the receiver in his official capacity for the wrongs of his employees, are in the nature of proceedings *in rem*, and render the property in his hands liable for compensation. *Davis v. Duncan*, 19 Fed. Rep. 477; *Farmers Loan & T. Co. v. Central Railroad*, 7 Fed. Rep. 539; *Rogers v. Wheeler*, 48 N. Y. 598; *Barter v. Wheeler*, 49 N. H. 9.

² *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174; *Com. v. Franklin L. Ins. Co.* 115 Mass. 278; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Southern Exp. Co.*

v. Western N. O. R. Co. 99 U. S. 191, 25 L. ed. 319; *Brown v. Warner*, 78 Tex. 543, 11 L. R. A. 394.

³ *Russell v. Bristol*, 49 Conn. 251; *Greene v. Sprague Mfg. Co.* 52 Conn. 830; *Coope v. Bowles*, 42 Barb. 87; *Yeager v. Wallace*, 44 Pa. 294; *Manloes v. Burger*, 88 Ind. 211.

A note executed by a corporation to one who has previously given a check drawn to the individual order of its vice president, which has been used by the corporation for its own purposes, is a valid claim against the corporation or a receiver appointed in proceedings for its dissolution. *People v. American S. B. Ins. Co.* 8 App. Div. 504.

some act of his which he is not authorized to perform.¹ While it is a subject of criticism, yet it seems that a receiver may sell receivership property to a company of which he is the manager at the highest market price, and not be required to account for profits.² But he will not be permitted to speculate in the stock of the corporation over which he is appointed.³

(i) LIABILITY ON ORDER OF COURT.

Where the court makes an order directing the receiver to pay a fixed sum of money to a certain person, it is in effect a personal judgment upon which the receiver is personally liable.⁴

§ 235. Suits by receiver of a corporation.

(a) GENERALLY.

We have heretofore considered the power of the receiver to institute and carry on suits generally,⁵ and briefly in this connection revert to the subject in connection with corporations. A receiver of an insolvent corporation succeeds to the title, property, effects, and rights of action, when so invested by the statute or decree of court appointing him, and as a rule, is the proper party to enforce them by legal proceedings. When the officers of a corporation fail to discharge the important duties and trusts imposed upon them, they become liable for the corporate losses resulting therefrom.⁶ Independent of statutory power,

¹ *Chandler v. Cushing-Young Shingle Co.* 18 Wash. 89.

² *Chandler v. Cushing-Young Shingle Co.* 18 Wash. 89. He cannot, however, intermeddle in questions affecting the rights of parties in the disposition of property in his hands. *Hesing v. Atty. Gen.* 104 Ill. 292; *Blatchford v. Newberry*, 100 Ill. 484.

³ *Olmstead v. Distilling & C. F. Co.* 67 Fed. Rep. 24, 2 Am. & Eng. Corp. Cas. N. S. 892.

⁴ *Crawford v. Fickey* (W. Va.) 2 Am. & Eng. Corp. Cas. N. S. 417; *Rickard v. Schley*, 27 W. Va. 617.

⁵ Chap. VI.

⁶ *Thompson v. Greeley*, 107 Mo. 577; *Alexander v. Relfe*, 74 Mo. 516; *Gill*

v. Balis, 72 Mo. 429; *Bent v. Priest*, 86 Mo. 482; *Slattery v. St. Louis & N. O. Transp. Co.* 91 Mo. 217; *Louisville City Nat. Bank v. Loving*, 82 Ky. 370; *Hodges v. New England Screw Co.* 1 R. I. 312; *Hayes v. Kenyon*, 7 R. I. 136; *Smith v. Hurd*, 12 Met. 371; *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371; *Hun v. Cary*, 82 N. Y. 70; *Horn Silver Min. Co. v. Ryan*, 42 Minn. 198; *Brouwer v. Hill*, 1 Sandf. 629; *New Orleans Gaslight Co. v. Bennett*, 6 La. Ann. 457; *Gindrat v. Dane*, 4 Cliff. 260; *Gaslight & Bkg. Co. v. Haynes*, 7 La. Ann. 114; *White v. Haight*, 16 N. Y. 810; *Osgood v. Laytin*, 48 Barb. 464; *Shaughnessy v. Rensselaer Ins. Co.* 21 Barb. 605; *Hyde v. Lynde*, 4 N. Y.

the receiver is authorized to recover for property illegally disposed of in fraud of corporate creditors.¹ He may likewise recover from stockholders unearned premiums illegally paid them from the capital stock when the corporation was insolvent. Such a suit is not a proceeding to enforce stock liability, but is rather a proceeding to recover back funds wrongfully paid to and received by the stockholders.² And so also where the assets of an insolvent corporation are unlawfully transferred to its officers.³

887; *Terry v. Bamberger*, 14 Blatchf. 234.

In *Penn Bank, Warner, v. Hopkins*, 111 Pa. 328, a suit was maintained by the corporation for the use of an assignee against directors for mismanagement.

¹The receiver has power, independent of a statute, to recover money due the corporation, and for property illegally disposed of in violation of the rights of creditors. *Osgood v. Laytin*, 48 Barb. 463.

A receiver may prosecute a writ of error to review a judgment denying his right to open up a judgment against the corporation over which he is appointed. *Rust v. United Waterworks Co.* 70 Fed. Rep. 129.

Plaintiffs in an injunction suit who give a bond payable to the defendant as receiver and seek to enjoin him as receiver from collecting money due the insolvent estate are precluded in an action by the receiver on the bond from raising any question concerning his appointment or qualification. *Wason v. Frank* (Colo. App.) 44 Pac. 378.

²The receiver may also maintain suit in equity against the stockholders to recover unearned premiums paid them out of the capital of the bank when no net profits had been earned, and when in fact the corporation was insolvent. In such a case,

it is not a suit to enforce the individual liability, but is to follow and recover a part of the capital which was wrongfully paid to and received by the stockholders. *Hayden v. Thompson*, 70 Fed. Rep. 60, 2 Am. & Eng. Corp. Cas. N. S. 511. Cf. *Bailey v. Mosher*, 68 Fed. Rep. 488; *First Nat. Bank v. Colby*, 88 U. S. 21 Wall. 609, 22 L. ed. 687; *Hornor v. Henning*, 98 U. S. 228, 23 L. ed. 879; *Stephens v. Overstolz*, 48 Fed. Rep. 771; *National Bank v. Peters*, 44 Fed. Rep. 13.

³An insolvent corporation practically out of business cannot transfer part of its assets to creditors who are officers of the company, or who are intimately connected therewith, and, such a conveyance being fraudulent, the receiver may recover the property. *Smith v. Hopkins*, 10 Wash. 77.

The receiver of an insolvent corporation cannot maintain an action to set aside judgments by default against the corporation for debts honestly due, without having set aside a provision in the order appointing him, making such judgments a first lien upon all the money and assets of such corporation, to be paid in full before payment of any other creditors. *Ridgway v. Symons*, 4 App. Div. 98.

It is unusual, and generally improper, to adjust the rights of parties in the order of appointment.

(b) WHEN HE MAY SUE IN HIS OWN NAME.

A receiver may maintain suit in his own name, (1) when the legal title to the corporate assets has been assigned to him;¹ (2) when the court by decree has so empowered him;² (3) or when the statute so provides.³ As the representative of the stockholders and creditors of the corporation the receiver cannot maintain a suit against the corporate directors which the corporation itself could not have maintained had the receiver not been appointed.⁴ The general rule is that a receiver cannot bring

¹ *St. Louis & S. Coal & M. Co. v. Sandoval Coal & M. Co.* 111 Ill. 82; *King v. Cutts*, 24 Wis. 627; *Yeager v. Wallace*, 44 Pa. 294; *Ingersoll v. Cooper*, 5 Blackf. 426; *Gray v. Lewis*, 94 N. C. 392; *Boyd v. Royal Ins. Co.* 111 N. C. 872.

A receiver by virtue of his appointment and character as representative of all parties interested in the property is a quasi assignee, and is invested with the title to all rights of action possessed by his principal at the time of the appointment, to such extent at least as will enable him to sue upon them in his official character. *Hardin v. Sweeney* (Wash.) 44 Pac. 188.

The receiver of an insolvent toll-road company may bring in his own name an action on an undertaking in an injunction against him and the insolvent company to restrain him from collecting the toll payable to him as receiver, although the bond was payable to the company as well as himself. *Wason v. Frank* (Colo. App.) 44 Pac. 378.

² *Leonard v. Storrs*, 81 Ala. 488; *Wilkinson v. Rutherford*, 49 N. J. L. 241; *Davis v. Gray*, 88 U. S. 16 Wall. 208, 21 L. ed. 447; *Davis v. Ladoga Creamery Co.* 128 Ind. 222; *Wilson v. Welsh*, 157 Mass. 77; *Garver v. Kent*, 70 Ind. 428; *Davis v. Talbot*, 137 Ind. 235.

He has power to file a bill to foreclose a mortgage given to the corporation (*Cormer v. Bray*, 83 Ala. 217); or to bring suit to recover possession of real estate (*Baker v. Cooper*, 57 Me. 388); or to recover subscription to the capital stock (*Frank v. Morrison*, 58 Md. 428); or to recover on a note to the corporation. *Hayes v. Broteman*, 46 Md. 519.

³ *Miami Exporting Co. v. Gano*, 13 Ohio, 269; *Screven v. Clark*, 48 Ga. 41; *Battle v. Davis*, 66 N. C. 252; *Renick v. Bank of West Union*, 13 Ohio, 298; *Leonard v. Storrs*, 81 Ala. 488; *Hardwick v. Hook*, 8 Ga. 354; *Helms v. Littlejohn*, 12 La. Ann. 298; *Davenport v. Buffalo City Bank*, 9 Paige, 15; *Hobart v. Bennett*, 77 Me. 401; *Baker v. Cooper*, 57 Me. 388; *Hayden v. Thompson*, 70 Fed. Rep. 60, 2 Am. & Eng. Corp. Cas. N. S. 511; *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879; *Stephens v. Overstolz*, 43 Fed. Rep. 771; *National Exch. Bank v. Peters*, 44 Fed. Rep. 13; *Garver v. Kent*, 70 Ind. 428; *Gray v. Lewis*, 94 N. C. 392; *Davis v. Snead*, 88 Gratt. 705; *Gill v. Balis*, 72 Mo. 424; *Manlove v. Burger*, 88 Ind. 211; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476; *Mathis v. Pridham*, 1 Tex. Civ. App. 58.

⁴ The receiver of a bank appointed in proceedings for its dissolution cannot maintain against the directors any

suits in his own name, in the absence of statutory power, unless the legal title is in him,¹ or unless the decree appointing the receiver expressly authorizes him so to do. The tendency seems to be in the direction of regarding the receiver as an assignee of all rights of action possessed by his principal at the date of appointment, and therefore entitled to sue upon them in his official character. The refined distinctions at one time so tenaciously adhered to in this regard have been relaxed and courts are disposed to look to the end sought by the proceeding and the equitable modes of reaching it and securing redress rather than the technical legal aspects of the parties. It would seem to be settled, however, where the receiver is not authorized by the order to sue to recover the property of the corporation, and such property has not been assigned to him, and has never been in his possession as receiver, he must bring suit in the name of the corporation.²

action in favor of the stockholders or creditors which the bank itself could not have maintained before its dissolution. *Higgins v. Tefft*, 4 App. Div. 63.

¹ *St. Louis & S. Coal & M. Co. v. Sandoval Coal & M. Co.* 111 Ill. 32. As to authority from the court so to do, see *Leonard v. Storrs*, 81 Ala. 488. But see *Ingersoll v. Cooper*, 5 Blackf. 426.

² *Harland v. Bankers & M. Teleg. Co.* 33 Fed. Rep. 199, *contra*, 32 Fed. Rep. 305; *Manlove v. Burger*, 38 Ind. 211. But in suits in regard to real estate he must obtain title in order to sue. *Dick v. Struthers*, 25 Fed. Rep. 103. For an act of conversion occurring prior to the appointment of a receiver in a partnership case the suit must be in the name of the firm. *Yeager v. Wallace*, 44 Pa. 294. See *Wilson v. Welch*, 157 Mass. 77. In this case Mr. Chief Justice Field says: "Although the practice in this commonwealth has not been uniform (See *Farmers & M. Bank v. Jenks*, 7 Met. 592; *Boot & Shoe Mfrs. Mut. F. Ins. Co. v. Melrose Orthodox Cong. Soc.* 117 Mass. 199; *Sohier v. Lamb*, 184 Mass. 275; and

Parker v. Nickerson, 137 Mass. 487) we consider the law to be that a receiver of a corporation appointed by a court of equity cannot bring suit in his own name to recover property of the corporation which has never been in his possession unless he is authorized so to do by statute or by the decree of a court competent to give him such authority, or unless the title to the property has been conveyed to him. Courts of equity cannot transfer the title to property by decree unless authorized by statute although they can compel the defendant to transfer the title. *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 151 Mass. 515, 8 L. R. A. 309."

Cf. *Freeman v. Winchester*, 10 Smedes & M. 577; *Garver v. Kent*, 70 Ind. 428; *Moriarty v. Kent*, 71 Ind. 601; *Harrell v. Kent*, 71 Ind. 602; *Justice v. Kirlin*, 17 Ind. 588; *Horron v. Vance*, 17 Ind. 595; *King v. Outts*, 24 Wis. 627; *Yeager v. Wallace*, 44 Pa. 294; *Newell v. Fisher*, 24 Miss. 392; *Wilson v. Allen*, 6 Barb. 542. But see *Alexander v. Reife*, 74 Mo. 495; *Wray v. Jamison*, 10 Humph. 186.

Where the receiver derives his authority to sue from the court he must allege such authority.¹ Under the National Banking Act (13 Stat. at L. 99) suits may be brought by the receiver in his own name, or in the name of the corporation,² unless the case is pending in a state where the common-law pleading prevails, in which case the suit is in the name of the corporation.³

A receiver appointed under a statute upon the dissolution of a corporation is regarded as in the nature of a trustee to collect and distribute the corporate assets and may sue in the courts of another jurisdiction upon a debt due the corporation.⁴

¹ *Wayne Pike Co. v. State*, 184 Ind. 672; *Asheville Dis. No. 15, S. of T. v. Aston*, 92 N. C. 578; *Miami Exporting Co. v. Gano*, 13 Ohio, 269.

² *First Nat. Bank v. National Pahquioque Bank*, 81 U. S. 14 Wall. 383, 20 L. ed. 840; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476.

³ *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790.

In general the receiver is authorized to bring all suits in his own name where it is required for the attainment of justice. *Iglehart v. Bierce*, 36 Ill. 186; *Lathrop v. Knapp*, 27 Wis. 215; *Hardwick v. Hook*, 8 Ga. 354; *Helme v. Littlejohn*, 12 La. Ann. 298; *Henning v. Raymond*, 85 Minn. 808; *Wray v. Jamison*, 10 Humph. 186; *Haxtun v. Bishop*, 3 Wend. 18.

As to the power of a court of equity acting under its general equity powers only to give authority to its receiver to sue in his own name, see *Amy v. Manning*, 149 Mass. 487; *Davis v. Gray*, 83 U. S. 16 Wall. 203, 21 L. ed. 447; *Yeager v. Wallace*, 44 Pa. 294; *Re Sacker*, L. R. 22 Q. B. Div. 179; *Battle v. Davis*, 66 N. C. 252; *Wilson v. Welch*, 157 Mass. 77; *Thompson v. Greeley*, 107 Mo. 577.

⁴ *Avery v. Boston Safe-Deposit & T. Co.* 72 Fed. Rep. 700.

A receiver appointed under a state statute providing for the winding-up

of the affairs of a corporation under the direction of a receiver to be appointed by the court, and the conversion of its property into money, has the same title and power of control over the property of a corporation of the state, situated in another state, as over that in the state of his appointment. *American Nat. Bank v. National Ben. & C. Co.* 70 Fed. Rep. 420; *Black v. Ore Knob Copper Co.* 115 N. C. 382.

The receiver of an insolvent corporation, appointed under Minn. Gen. Stat. 1894, § 5897, may maintain an independent action to enforce the payment of a call on unpaid subscriptions made by the board of directors according to the by-laws and payable before the commencement of the proceedings resulting in his appointment. *Basting v. Ankeny* (Minn.) 66 N. W. 266.

A bill by receivers of an insolvent corporation against a stockholder to enforce his liability upon his subscription is properly filed as auxiliary or ancillary to the original suit in which such receivers were appointed. *Ross Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.* 72 Fed. Rep. 957.

The action being to enforce a legal right must be an action at law. *Freeman v. Winchester*, 10 Smedes & M. 577.

§ 236. To recover stock subscriptions.

There is not entire harmony in the decisions in relation to the right of the receiver to institute and prosecute suits to enforce the liability of stockholders for unpaid subscriptions. The confusion is probably very largely owing to the dissimilar statutes and the various methods of construction resorted to by the courts in their efforts to interpret the legislative will relative to insolvent corporations. Another element of discord has grown out of the view that some courts have entertained that a receiver was the representative of the corporation, and limited in the exercise of power to that which the corporation could have exercised but for the receivership; while other courts have regarded the receiver as more particularly the representative of creditors of the corporation, and therefore exercising powers, in some instances, which the law of estoppel would prevent the corporation from exercising. But little more can be accomplished in this connection than by stating, as precisely as possible, the general trend of the decisions, unmodified or influenced by statutory effects.

(a) As a general rule, the receiver of an insolvent corporation may, in a proper action, recover from a stockholder the unpaid

An action under Minn. Gen. Stat. 1894, § 5897, to sequester corporate assets and to enforce the constitutional liability of the stockholders for corporate debts, does not *per se* supersede a general prior assignment for the benefit of creditors; and the plaintiff therein is not entitled as of right to have a receiver appointed to take the corporate assets from the possession of the prior assignee. *International Trust Co. v. American Loan & T. Co.* (Minn.) 65 N. W. 78, Rev'd on other grounds on Rehearing in 65 N. W. 632.

Inability of the receiver of a bank appointed in proceedings for its dissolution to realize more than 60 per cent of the claims of the creditors of the bank will not entitle him to seek the aid of a court of equity for any relief which he could obtain in an ac-

tion at law against defaulting directors. *Higgins v. Tefft*, 4 App. Div. 63.

A suit may be maintained in equity by the receiver of an insolvent national bank against all its shareholders to recover dividends unlawfully paid to them out of the capital at times when the bank earned no net profits and was in fact insolvent, as the numerous actions at law against the several stockholders would not furnish as efficient, practical, and prompt a remedy. *Hayden v. Thompson*, 71 Fed. Rep. 60.

An allegation in an action by a receiver, that plaintiff was duly appointed and qualified, is not demurrable for failure to show the facts of his appointment and qualification. *Wason v. Frank* (Colo. App.) 44 Pac. 878.

balance of his stock subscription to the extent necessary to pay the indebtedness of the corporation, subject only to such limitations as would have been effective against the directors had the receiver not been appointed.¹

(b) Where this right is vested in the receiver it is to the exclusion of the right of individual creditors to prosecute similar actions.²

¹ *Whittlesey v. Frantz*, 74 N. Y. 456; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Dayton v. Borst*, 81 N. Y. 435; *Rankins v. Elliott*, 16 N. Y. 877; *Calkins v. Atkinson*, 2 Lans. 12; *Sagory v. Dubois*, 8 Sandf. Ch. 466; *Pentz v. Hawley*, 1 Barb. Ch. 122; *Van Wageningen v. Clark*, 23 Hun, 497; *Mann v. Pentz*, 8 N. Y. 415; *Ruggles v. Brock*, 6 Hun, 164; *Tucker v. Gilman*, 45 Hun, 193; *Billings v. Robinson*, 28 Hun, 122; *Dean v. Biggs*, 25 Hun, 122; *Dorris v. French*, 4 Hun, 292; *Nathan v. Whillock*, 9 Paige, 152; *Farmers & M. Bank v. Jenks*, 7 Met. 592; *Howard v. Glenn*, 85 Ga. 288; *Tobey v. Russell*, 9 R. L. 58; *Gaslight & Bkg. Co. v. Haynes*, 7 La. Ann. 114; *New Orleans Gaslight Co. v. Bennett*, 6 La. Ann. 457; *Stark v. Burks*, 5 La. Ann. 740; *Hewett v. Adams*, 54 Me. 206; *Frank v. Morrison*, 58 Md. 423; *Stillman v. Dougherty*, 44 Md. 880. The receiver as an officer of court may make calls for the amount due. *Hall v. United States Ins. Co.* 5 Gill, 484; *Lewis v. Robertson*, 18 Smedes & M. 558; *Clarke v. Thomas*, 84 Ohio St. 46; *Black v. Ore Knob Copper Co.* 115 N. C. 382; *Showalter v. Laredo Improv. Co.* 88 Tex. 162; *Stewart v. Lay*, 45 Iowa, 604; *Schoonover v. Hinckley*, 48 Iowa, 82; *Big Creek Stone Co. v. Seward* (Ind.) 42 N. E. 464; *Great Western Teleg. Co. v. Gray*, 122 Ill. 630; *Lamar Ins. Co. v. Gulick*, 103 Ill. 41; *Chandler v. Brown*, 77 Ill. 383. See *Republic L. Ins. Co. v. Swigert*, 185 Ill. 150, 12 L. R. A. 328; *Merchants' Nat. Bank v. Northwestern Mfg. & Car Co.* 48 Minn.

861; *Basting v. Ankeny* (Minn.) 66 N. W. 266; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Elderkin v. Peterson*, 8 Wash. 674; *Showalter v. Laredo Improv. Co.* 88 Tex. 162; *Vanderwerken v. Glenn*, 85 Va. 9; *Lathrop v. Knapp*, 27 Wis. 214, 37 Wis. 807; *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.* 72 Fed. Rep. 957; *Means' Appeal*, 85 Pa. 75.

Under the Railway Companies Act of 1867 in England a receiver has no power to collect the unpaid subscriptions. *Re Birmingham & L. J. R. Co.* L. R. 18 Ch. Div. 155.

A stockholder who has paid his subscription has a right to insist that those who have not paid shall be compelled by the receiver to do so. *Nathan v. Whillock*, 9 Paige, 152, and the court has power to equalize the payments among the stockholders. *Dayton v. Borst*, 81 N. Y. 435; *Clarke v. Thomas*, 84 Ohio St. 46.

² *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Merchants' Nat. Bank v. Northwestern Mfg. & Car Co.* 48 Minn. 361.

A creditor of a corporation cannot maintain an action to recover subscriptions from stockholders, where a receiver of the corporation has been appointed, and it does not appear that he has refused to bring the action. *Big Creek Stone Co. v. Seward* (Ind.) 42 N. E. 464. But see *Lexington Life, F. & M. Ins. Co. v. Page*, 17 B. Mon. 412, as to right of a corporation to sue where a receiver has been appointed.

(c) He may enforce this liability regardless of collusive and fraudulent attempts on the part of the officers and stockholders to evade liability.¹

(d) He may enforce such stock liability, it would seem, only to the extent necessary to pay the debts.²

(e) The right of the receiver to enforce stock liability is based upon the condition that the court has previously determined the amount of the corporate indebtedness and fixed the liability of each share of stock, and these are necessary allegations in the petition.³

¹ *Nathan v. Whitlock*, 9 Paige, 152; *Sagory v. Dubois*, 8 Sandf. Ch. 466; *Parker v. Nickerson*, 187 Mass. 487; *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 21 L. ed. 731. See *contra*, *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 13 L. R. A. 828; *Winters v. Armstrong*, 37 Fed. Rep. 508; *Piscataqua, F. & M. Ins. Co. v. Hill*, 60 Me. 178; *Putnam v. New Albany & S. C. J. R. Co.* ("Burke v. Smith"), 83 U. S. 16 Wall. 895, 21 L. ed. 863; *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, but in such case the question of good faith is an important element. *Nettles v. Marco*, 33 S. C. 47.

In Missouri, an assignee for the benefit of creditors on a bill in chancery filed by him may compel the directors of an insolvent corporation to make an assessment payable to him. *Lionberger v. Broadway Sav. Bank*, 10 Mo. App. 499. The receiver has no power to collect where no call has been made. *Hannah v. Moberly Bank*, 67 Mo. 678.

In Iowa, it is held that an individual stockholder cannot, in a common-law proceeding, be compelled to pay his subscription until a general call is made, showing a necessity for an assessment. *Chandler v. Keith*, 42 Iowa, 99.

Statutory liability is not an asset and not enforceable by the receiver.

Farnsworth v. Wood, 91 N. Y. 308. Cf., as to assignee, *Bouton v. Dement*, 123 Ill. 142.

The receiver of an insolvent corporation may sue in a foreign jurisdiction to recover stock subscriptions. *Mann v. Cooke*, 20 Conn. 178; *McDonough v. Phelps*, 15 How. Pr. 372; *Seymour v. Sturges*, 26 N. Y. 134.

But he has no power to compromise unpaid subscriptions. *Chandler v. Brown*, 77 Ill. 333.

² *Bouton v. Dement*, 123 Ill. 142.

³ *Chandler v. Keith*, 42 Iowa, 99; *American Ins. Co. v. Schmidt*, 19 Iowa, 502; *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294; *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Vanderwerken v. Glenn*, 85 Va. 9; *Glenn v. Williams*, 60 Md. 93; *Glenn v. Semple*, 80 Ala. 159; *Liggett v. Glenn*, 51 Fed. Rep. 881.

An action at common law upon a subscription must be in the name of the corporation. *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790 (Assignment).

In Indiana a creditor of a corporation can collect his debt from unpaid subscriptions only through the receiver. *Wheeler v. Thayer*, 121 Ind. 64.

To collect a stock liability the receiver may proceed at law or in equity. *Stanton v. Wilkeson*, 8 Ben. 357; *Morrow v. San Francisco Super.*

(f) The liability of a stockholder upon his stock subscription can be determined only in a suit by the receiver for that purpose and not in the original action in which the receiver is appointed.¹ Where the suit is brought by the receiver an allegation that he was duly appointed and qualified, without showing the facts relating to his appointment, is sufficient.²

Ok. 64 Cal. 888; *Borland v. Haven*, 87 Fed. Rep. 394; *Potter v. Dear*, 95 Cal. 578; *Baines v. Babcock*, 95 Cal. 581; *Baines v. Story* (Cal.) 80 Pac. 777; *Culver v. Third Nat. Bank*, 64 Ill. 528.

In Illinois the action is at law. *Thompson v. Meisser*, 108 Ill. 359; *Schalucky v. Field*, 124 Ill. 617; *Meisser v. Thompson*, 9 Ill. App. 368; *Buchanan v. Meisser*, 105 Ill. 638; *Arenz v. Weir*, 89 Ill. 25; *McCarthy v. Lavoscha*, 89 Ill. 270; *Fuller v. Ledden*, 87 Ill. 310; *Tiddalls v. Libby*, 87 Ill. 142; *Corwith v. Culver*, 69 Ill. 502; *Wincock v. Turpin*, 96 Ill. 135.

If, however, the liability is to the creditors as a class the remedy is in equity. *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879; *Harper v. Union Mfg. Co.* 100 Ill. 225; *Rounds v. McCormick*, 114 Ill. 252; *Young v. Farwell*, 139 Ill. 326; *Low v. Buchanan*, 94 Ill. 76; *Queenan v. Palmer*, 117 Ill. 619; *Eames v. Doris*, 102 Ill. 350; *Hickling v. Wilson*, 104 Ill. 54.

In Illinois the courts refuse permission to prosecute a suit in equity by creditors of a nonresident corporation against Illinois stockholders. *Young v. Farwell*, 139 Ill. 326. And the same rule prevails in Massachusetts. *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349.

In Iowa it is held that the court in an interlocutory proceeding has no right to make an assessment against stockholders for unpaid stock in a proceeding for the appointment of a receiver, in the absence of an allega-

tion that the stockholders are too numerous to be made parties. *Lamar Ins. Co. v. Hildreth*, 55 Iowa, 248. See also *Chandler v. Brown*, 77 Ill. 388; *Chandler v. Dore*, 84 Ill. 275.

There must be a deficiency in the assets first established in Maine before a proceeding is instituted by the receiver to recover a stock liability. *Hewett v. Adams*, 54 Me. 206. As to the practice in Missouri, see *Hannah v. Moberly Bank*, 67 Mo. 678.

In an action against an insolvent corporation where an order is made directing the receiver to institute proceedings against stockholders for unpaid subscriptions, it is held that the liability of the stockholders will not be determined in such proceeding, but only in a proceeding by the receiver against the stockholder. *Black v. Ore Knob Copper Co.* 115 N. C. 382.

See ¶ f following and note 1.

¹ *Showalter v. Laredo Improv. Co.* 83 Tex. 162.

² *Edes v. Strunk*, 35 Neb. 307; *Springs v. Bowery Nat. Bank*, 63 Hun, 505; *Bangs v. McIntosh*, 23 Barb. 591. But see *Stewart v. Beebe*, 28 Barb. 34.

Inasmuch as a stockholder is a creditor it has been supposed that the amount due him may be set-off against his subscription, but this is not true, for the reason that the capital stock is a trust fund for the payment of creditors and liability thereon is not subject to set-off. *Williams v. Traphagan*, 88 N. J. Eq. 57; *Scott v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Sawyer v. Hoag*, 84 U. S. 17 Wall.

§ 237. To avoid fraudulent transfers.

It is the settled doctrine that a receiver of an insolvent corporation represents not only the corporation but also its creditors and stockholders and that in his character as trustee for the latter he may disaffirm and maintain an action as receiver to set aside illegal and fraudulent transfers of the property of the corporation made by its agents and officers, or to recover its securities invested or misapplied. Such right is vested in the receiver upon his appointment. The decree dissolving a corporation and for the distribution of its assets is a decree in the nature of a judgment for all the creditors.¹ The law upon this subject is not entirely

610, 21 L. ed. 731; *Bain v. Clinton Loan Assn.* 112 N. C. 248; *Appleton v. Turnbull*, 84 Me. 72.

¹ *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272. In this case the decree dissolved the corporation and vested in the receiver all its property, assets, and effects for the purpose of distribution among the creditors and other persons interested in the fund under the direction of the court and the provisions of the statute relative to insolvent corporations.

In *Re Globe Ins. Co.* 6 Paige, 102, the court say: "It is the settled doctrine that the receiver of an insolvent corporation represents not only the corporation but also creditors and stockholders, and that in his character as trustee for the latter he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its agents or officers, or to recover its funds or securities invested or misapplied." *Gillet v. Moody*, 8 N. Y. 479; *Talmage v. Pell*, 7 N. Y. 828; *Whittlesey v. Delaney*, 78 N. Y. 571 (fraudulent judgment); *Vail v. Hamilton*, 85 N. Y. 453.

In Illinois it is held that a general assignment for the benefit of creditors does not pass to the assignee any in-

terest in property before that fraudulently transferred by the assignor nor any right to impeach or set aside such fraudulent transfer—such right belonging to the creditors alone. *Bouton v. Dement*, 123 Ill. 142. This case is based upon *Brownell v. Curtis*, 10 Paige, 210; *Leach v. Kelsey*, 7 Barb. 466; *Estabrook v. Messersmith*, 18 Wis. 545; *Flower v. Cornish*, 25 Minn. 478; *Lund v. Skanes Enskilda Bank*, 96 Ill. 181.

A receiver of a corporation who represents the creditors as well as the corporation is not estopped to claim that a transfer of the property of the corporation by its president was fraudulent. *Nevitt v. First Nat. Bank*, 91 Hun, 48.

The great weight of authority is, however, in favor of the right of the assignee to impeach fraudulent conveyances. See *Pillsbury v. Kingon*, 83 N. J. Eq. 287, and cases there cited, and note with additional cases. Cf. *Germantown Pass. R. Co. v. Filler*, 60 Pa. 124; *Eppright v. Nickerson*, 78 Mo. 482; *Shockley v. Fisher*, 75 Mo. 498; *Heineman v. Hart*, 55 Mich. 64.

The law of Illinois applicable to assignees is applied to receiverships in insurance corporations in *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 828, where it is held that it is

harmonious, some of the cases holding that the property of a corporation fraudulently transferred before the receiver's appointment can only be reached by an action by the corporation itself.¹

He is authorized to bring suit to recover dividends illegally paid to the stockholders of an insolvent corporation, as shown in the following section.

not a power inherent in a court of chancery and not in accordance with the course of procedure and practice which ordinarily obtains in equity for the court to cloth its receiver with power to seize and enforce a property right which belongs only to parties who are not before the court and are not asking its assistance. For the purpose of litigation the receiver takes only the rights of the corporation such as can be asserted in the name of the corporation itself. Upon this basis only can the receiver litigate for the benefit of either shareholders or creditors.

It is held in *Great Western Teleg. Co. v. Gray*, 122 Ill. 630, an action by the corporation for the use of the receiver, that a court of equity has jurisdiction to appoint a receiver where the board of directors were guilty of mismanagement and malfeasance and order him in the corporate name to collect unpaid subscriptions. Cf. *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 828.

¹The cases holding that an assignee or receiver may impeach the fraudulent conveyances of his principal are as follows: *Freeland v. Freeland*, 102 Mass. 475; *Lynde v. McGregor*, 18 Allen, 172; *Blake v. Sawin*, 10 Allen, 340; *Gibbs v. Thayer*, 6 Cush. 30; *Kilbourne v. Fay*, 29 Ohio St. 264; *Hallowell v. Bayliss*, 10 Ohio St. 537; *Waters v. Dashiell*, 1 Md. 455; *Richards v. New Hampshire Ins. Co.* 43 N. H. 263; *Shipman v. Aetna Ins. Co.* 29 Conn. 245; *Swift v. Thompson*, 9 Conn.

68; *Palmer v. Thayer*, 28 Conn. 237; *Simpson v. Warren*, 55 Me. 18; *European & N. A. R. Co. v. Poor*, 59 Me. 277; *Staton v. Pittman*, 11 Gratt. 99; *Clough v. Thompson*, 7 Gratt. 26; *Doyle v. Peckham*, 9 R. I. 21; *Hayes v. Kenyon*, 7 R. I. 142; *Moncure v. Hanson*, 15 Pa. 385; *Tams v. Bullitt*, 35 Pa. 308; *Stonebridge v. Perkins*, 141 N. Y. 1; *Atkinson v. Rochester Printing Co.* 114 N. Y. 168; *Vail v. Hamilton*, 85 N. Y. 458; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Southard v. Benner*, 72 N. Y. 424; *Hoyle v. Plattsburg & M. R. Co.* 54 N. Y. 814; *McMahon v. Allen*, 35 N. Y. 408; *Robinson v. Bank of Attica*, 21 N. Y. 406; *Brouwer v. Harbeck*, 9 N. Y. 589; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Rudd v. Robinson*, 54 Hun, 839; *Kingsley v. First Nat. Bank*, 31 Hun, 329; *Nathan v. Whitlock*, 9 Paige, 152; *Leavitt v. De Launay*, 4 Sandf. Ch. 281; *Butcher v. Harrison*, 4 Barn. & Ad. 129; *Doz, Grimsby, v. Ball*, 11 Mees. & W. 531; *Norcutt v. Dodd*, 1 Craig & Ph. 100; *Holmes v. Penney*, 8 Kay & J. 90; *Graham Button Co. v. Spielman*, 50 N. J. Eq. 120; *Pillsbury v. Kingon*, 33 N. J. Eq. 287; *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505; *Farmers' Loan & T. Co. v. Minneapolis Engine & Mach Works*, 35 Minn. 543; *Paine v. Lake Erie & L. R. Co.* 31 Ind. 353; *State v. State Bank*, 40 Neb. 192; *Wardell v. Union P. R. Co.* 103 U. S. 651, 26 L. ed. 509; *Drury v. Milwaukee & S. R. Co.* 74 U. S. 7 Wall. 299, 19 L. ed. 41; *Bradley v. Converse*, 4 Cliff. 375;

§ 238. To recover illegal dividends.

The receiver has the right to sue for and recover back in the interest of creditors dividends paid out by the officers from the capital stock.¹ Dissenting stockholders have a right to prevent

Cumberland Coal & I. Co. v. Parish, 42 Md. 598; *Kitchen v. St. Louis, K. O. & N. R. Co.* 69 Mo. 224; *Chouteau v. Allen*, 70 Mo. 290; *Marshall v. Farmers' & M. Sav. Bank*, 85 Va. 676, 2 L. R. A. 534; *Flint & P. M. R. Co. v. Dewey*, 14 Mich. 477; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Commercial Nat. Bank v. Burch*, 141 Ill. 519; *Alexander v. Relfe*, 74 Mo. 495; *Thompson v. Greeley*, 107 Mo. 577.

Cases holding the contrary are as follows: *Estabrook v. Messersmith*, 18 Wis. 545; *Flower v. Cornish*, 25 Minn. 478; *Sere v. Pilot*, 10 U. S. 6 Cranch, 832, 3 L. ed. 240; *Leach v. Kelsey*, 7 Barb. 486; *Brownell v. Curtis*, 10 Paige, 210; *Browning v. Hart*, 6 Barb. 91; *Maiders v. Culver*, 1 Duv. 164; *Bouton v. Dement*, 123 Ill. 142. And see *Republic L. Ins. Co. v. Swigert*, 185 Ill. 150, 12 L. R. A. 328.

The receiver of an insolvent corporation cannot maintain an action to have an insurance policy on the life of one of the stockholders and directors made payable to another stockholder, and assigned for a valuable consideration to other persons, adjudged to belong to the assets of the corporation on the ground that the premiums were paid from the corporate funds, where such payment was made with the knowledge and consent of all the stockholders at a time when there were no corporate debts. *Little v. Garabrant*, 90 Hun, 404.

¹In *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, it is held that the adjudication of insolvency, and the appointment of a receiver are in the nature of a sequestration of the corporate property having the effect

of an attachment or execution in behalf of all creditors. In such case the receiver has in substance the same powers as an assignee in bankruptcy, or a receiver upon a creditor's bill or proceedings supplementary to execution, and he succeeds to the rights of the creditors as well as the insolvent corporation and has the power to enforce the rights which the creditors, but for the proceedings, might have enforced in their own behalf. *Farmers' Loan & T. Co. v. Minneapolis Engine Mach. Works*, 35 Minn. 543. "Among the rights which pass to the receiver as the representative of the creditors is the right to recover property conveyed by the corporation in fraud of its creditors, or capital withdrawn and refunded to the stockholders without provision for full payment of the corporate debts. This right of the receiver does not depend upon any express statute granting it but rests upon the general equitable doctrine that the capital of a corporation is a trust fund for the benefit of its creditors, and those to whom it has been refunded are trustees for their benefit."

Hayden v. Thompson, 71 Fed. Rep. 60, 2 Am. & Eng. Corp. Cas. N. S. 511. In such case, where the corporation is an insolvent bank, an order of the comptroller is not necessary. And a suit in equity is proper, inasmuch as the numerous common law actions would not furnish as efficient, practical, and prompt a remedy. This kind of an action does not rest upon any statute or act of Congress, but upon a fundamental principle of equity. Id.

the payment of unearned dividends, or the diversion of the corporate capital, or to compel its restoration,¹ and creditors or a receiver or liquidator have a similar right.² The power of the receiver in this class of actions is usually based upon the fact (a) that the statute invests him with such power, or (b) that the act complained of was *ultra vires* and therefore voidable by the corporation itself, or (c) the proceeding in which the receiver is appointed is a creditor's proceeding in which the receiver is the representative of the creditors and can therefore institute and prosecute such proceedings as they might have maintained, or (d) where the receiver is seeking to recover assets or property belonging to the debtor.³

¹*Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Bloxam v. Metropolitan R. Co.* L. R. 3 Ch. App. 337; *Holmes v. New-Castle-upon-Tyne Abattoir Co.* L. R. 1 Ch. Div. 682; *Guinness v. Land Corp. of Ireland*, L. R. 23 Ch. Div. 349; *Carlisle v. South-eastern R. Co.* 1 Macn. & G. 689; *Salisbury v. Metropolitan R. Co.* 38 L. J. Ch. 249.

²*Stringer's Case*, L. R. 4 Ch. 475; *Rance's Case*, L. R. 6 Ch. 104; *Re National Funds Assur. Soc.* L. R. 10 Ch. Div. 118; *Re Alexandra Palace Co.* L. R. 21 Ch. Div. 149.

But the receiver cannot transfer, as an asset, the right to attack such transfers. *Morris v. Morris*, 5 Mich. 171; *Brush v. Sweet*, 38 Mich. 574; *McMasters v. Campbell*, 41 Mich. 513; *Dickinson v. Seaver*, 44 Mich. 624; *Prosser v. Edmonds*, 1 Younge & C. 481; *Milwaukee & M. R. Co. v. Milwaukee & W. R. Co.* 20 Wis. 175; *Vose v. Grant*, 15 Mass. 505; *Munn v. Fairchild*, 2 Keyes, 106.

The receiver of a national bank may bring suit to recover dividends illegally paid to stockholders when the bank was insolvent. *Hayden v. Thompson*, 71 Fed. Rep. 60, 2 Am. & Eng. Corp. Cas. N. S. 511. And this

without an express order of the controller. *Id.*

Cf. *Osgood v. Layton*, 3 Abb. App. Dec. 418; *Hill v. Western & A. R. Co.* 86 Ga. 284; *Porter v. Sabin*, 149 U. S. 478, 37 L. ed. 815; *Gill v. Balis*, 72 Mo. 424.

³*Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L. R. A. 828; *Fairbanks v. Farwell*, 141 Ill. 354.

Gottlieb v. Miller, 154 Ill. 44. In this case it is held that a receiver could not attack a fraudulent act where his principal could not have done so.

In *Republic L. Ins. Co. v. Swigert*, *supra*, the question involved was whether the receiver in his official capacity could maintain a suit to recover from stockholders where, pursuant to a resolution of the board of directors, the stockholders surrendered their stock and new stock was issued in lieu thereof in amounts equal in par value to the cash payments made upon the original stock, and it was held the receiver could not recover. The decision is based upon the doctrine that the powers of the receiver are in this respect coextensive only with the powers of the corporation. The court does not seem to have given due weight to the purpose for which the

§ 239. Leave of court to sue required.

It is necessary that a receiver before bringing suit obtain leave of court authorizing suit, either general or special.¹ If the nature of the case is such as to require it, it may be expedient to give the receiver such general power in the order of appointment, and thus avoid the necessity of several applications therefor. If,

receiver was appointed under the provisions of the statute in question, *i. e.*, the dissolution of the corporation and the marshaling and distribution of its assets among those entitled thereto. In such case it would seem that the receiver is pre-eminently the representative of creditors, as much so at least as the receiver in a creditor's proceeding, where the court tacitly admits the receiver to be possessed of such power. At any rate the decision cannot be reconciled with the following cases:

"The receiver unites in himself the right of the trust combination and also the right of creditors, and that he may assert a claim as the representative of creditors which he might be unable to assert as a representative of the combination merely. The general rule is well established that a receiver takes the title of the corporation or the individual whose receiver he is and that any defense which would have been good against the former may be asserted against the latter. But there is a recognized exception which permits a receiver of an insolvent individual or corporation in the interest of creditors to disaffirm dealings of the debtor, in fraud of their rights." *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46; *Gillet v. Moody*, 8 N. Y. 479; *Porter v. Williams*, 9 N. Y. 142; *Curtis v. Leavitt*, 15 N. Y. 108; *Alexander v. Relfe*, 74 Mo. 495. *Cf. Stephens v. Perrine*, 148 N. Y. 476; *Mandeville v. Avery*, 124 N. Y. 885.

¹ *Battle v. Davis*, 66 N. C. 252; *King v. Cutts*, 24 Wis. 627; *Soreven v. Clark*, 48 Ga. 41.

Cf. Helme v. Littlejohn, 12 La. Ann. 298.

If the receiver sues to recover on a contract made with him directly, or to recover damages for injury to property in his possession, leave of court is not required. *Singerly v. Fox*, 75 Pa. 112; *Ponder v. Cutterson*, 127 Ind. 434; *Wilson v. Welch*, 157 Mass. 77; *Farnsworth v. Western U. Telog. Co.* 6 N. Y. Supp. 735.

A receiver is not required to obtain leave of the court appointing him to bring suit on an undertaking in injunction after procuring under authority of the court a judgment dissolving such injunction. *Wason v. Frank* (Colo. App.) 44 Pac. 878.

A receiver of an estate who brings a suit against certain legatees to gratify his dislike of them, without properly informing his counsel of the facts of the case, cannot recover the cost from the estate. *Henry v. Henry*, 103 Ala. 582.

A receiver of a bank appointed in proceedings for its dissolution who obtains leave of court to bring an action against defaulting directors does not entitle him to bring such action in a court of equity, where he would otherwise be required to bring the action at law. *Higgins v. Tefft*, 4 App. Div. 62.

Cf. Grant v. Davenport, 18 Iowa, 181.

however, the suit is likely to be protracted and expensive, special leave should be asked and obtained. A receiver being simply an officer of the court, his own protection requires that his action in regard to litigation should have the sanction of the court. Besides, at law, the party having the legal right to sue must do so, and where the receiver resorts to a court to assert the rights of another, he must show, as a part of his right to recover, his authority for so doing.¹ Like the general powers of a receiver, his power to sue must be, to some extent, governed by the nature of the proceeding.² If the receiver is empowered by statute to sue, he need not obtain special leave of court to sue,³ and may sue in a foreign jurisdiction.⁴ It is essential, where the receiver sues in his own name, that he allege in a traversable form his authority to maintain suit.⁵

In relation to rights of a receiver to sue in the United States courts, where the question of citizenship is involved, the citizenship of the receiver and not that of the corporation governs.⁶

§ 240. Suits by foreign receiver of corporation.

We have already examined the question of the rights and powers of a foreign receiver to sue in a foreign jurisdiction,⁷ and only revert to the subject in so far as receivers of corporations are concerned. While it is impossible to harmonize the cases bearing upon the question of the right of a foreign receiver to sue in a state other than that in which he is appointed, the weight of authority seems to establish the following propositions:

(a) Where proceedings are instituted for the purpose of dis-

¹ *Screen v. Clark*, 48 Ga. 41; *Bangs v. McIntosh*, 28 Barb. 591; *Stewart v. Beebe*, 28 Barb. 34.

² *Weill v. First Nat. Bank*, 106 N. C. 1; *Gray v. Lewis*, 94 N. C. 392; *Everett v. State, McKaig*, 28 Md. 190.

³ *Müller v. McKenzie*, 29 N. J. Eq. 291; *Gill v. Balis*, 72 Mo. 424; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476.

⁴ *Terry v. Bamberger*, 44 Conn. 558.

⁵ *Springs v. Bowers Nat. Bank*, 63 Hun, 505; *Bangs v. McIntosh*, 28 Barb. 591; *Gillett v. Fairchild*, 4 Denio, 80; *Edee v. Strunk*, 35 Neb. 307.

But see *White v. Joy*, 13 N. Y. 83; *Stewart v. Beebe*, 28 Barb. 34; *Hegewisch v. Silven*, 140 N. Y. 414; *Rockwell v. Morwin*, 45 N. Y. 166, as to what is sufficient allegation.

He should show that he has qualified by giving bond. *Hegewisch v. Silven*, 140 N. Y. 414. Unless he sues by order of court. *Boyd v. Royal Ins. Co.* 111 N. C. 872.

⁶ *Brisenden v. Chamberlain*, 53 Fed. Rep. 307; *Amory v. Amory*, 95 U. S. 186, 24 L. ed. 428; *Davies v. Lathrop*, 12 Fed. Rep. 853, 854.

⁷ § 71.

solving a corporation in the state of its creation, and a receiver is appointed thereunder, pursuant to the provisions of the statute, the property and assets of the corporation pass to and become vested in the receiver, and are *in custodia legis*, for the purpose of collection and distribution, and there is nothing in the statutes of the state in contravention of the laws or public policy of the state where suit is brought, and the citizens of the latter are not interested in the suit, such foreign receiver may maintain an action and will be sustained in the proceeding.¹

(b) Where a receiver has been appointed by a court of competent jurisdiction of another state, a creditor of that state who is bound by its decree appointing a receiver, cannot, as against the receiver, by attachment or execution, recover the assets of the corporation in another state.²

(c) Where a receiver appointed in one state is vested with the title to property in another state, he may, in an action in the latter state, assert his right to the possession, if such right is not in conflict with the rights of citizens of the latter state, nor against the public policy of its laws.³

¹ *Gilman v. Ketcham*, 84 Wis. 60, 23 L. R. A. 52; *Reynolds v. Adden*, 136 U. S. 353, 34 L. ed. 362; *Parker v. Stoughton Mill Co.* 91 Wis. 174.

A foreign receiver of a foreign corporation invested with practical ownership of the assets of the corporation may maintain an action against a resident of Wisconsin upon a note payable to the corporation. *Parker v. Stoughton Mill Co. supra.*

A receiver appointed by a state court of the property of an insolvent corporation, may be permitted by a Federal court in another state to defend an action there brought against the corporation. *Rust v. United Waterworks Co.* 70 Fed. Rep. 129.

² *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291; *Bacon v. Horne*, 123 Pa. 452, 2 L. R. A. 355; *Re Waite*, 99 N. Y. 433; *Phelps v. McCann*, 123 N. Y. 641; *Toronto Gen. Trust Co. v. Chicago, B. & Q. R. Co.* 123 N. Y. 37;

Woodward v. Brooks, 123 Ill. 232, 3 L. R. A. 702.

The receiver occupies the same position as an assignee for the benefit of creditors. *Parsons v. Charter Oak L. Ins. Co.* 81 Fed. Rep. 305; *Life Assn. of America v. Rundle* ("Relfe v. Rundle") 103 U. S. 222, 26 L. ed. 337; *Williams v. Hintermeister*, 26 Fed. Rep. 889.

³ *Rogers v. Haines*, 96 Ala. 536; *Boulware v. Davis*, 90 Ala. 207, 9 L. R. A. 601; *Gilman v. Ketcham*, 84 Wis. 60, 23 L. R. A. 52; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526; *Kain v. Smith*, 80 N. Y. 458; *Folger v. Columbian Ins. Co.* 99 Mass. 267; *Day v. Postal Teleg. Co.* 66 Md. 354; *Moseby v. Burrows*, 52 Tex. 396; *State Bank v. First Nat. Bank*, 84 N. J. Eq. 450; *National Trust Co. v. Miller*, 33 N. J. Eq. 155. But see *Farmers & M. Ins. Co. v. Needles*, 52 Mo. 17;

(d) Where the receiver has rightfully obtained possession of property situate within the jurisdiction of his appointment, and takes it to a foreign jurisdiction, in the rightful performance of his duty, and while there his possession is interfered with by creditors of the debtor residing in the latter state, the receiver will be protected.¹

Merchants' Nat. Bank v. McLeod, 38 Ohio St. 174.

A foreign receiver cannot maintain a suit in Wisconsin to set aside an alleged fraudulent conveyance made to a citizen of that state. *Filkins v. Nunnemacher*, 81 Wis. 91. But a foreign assignment was sustained in that state in favor of an assignee where attachment proceedings were commenced by citizens of a state other than Wisconsin and Michigan (residence of assignor and assignee). *Cook v. Van Horn*, 81 Wis. 291. But see *Rhawn v. Pearce*, 110 Ill. 350.

For a full collection of cases relative to the rights of resident and non-resident creditors in assignment and receivership matters, see note to *Long v. Forrest*, 150 Pa. 413, 23 L. R. A. 83.

Mr. Justice Magruder in *Holbrook v. Ford*, 153 Ill. 633, says: "Where the controversy is between a foreign receiver, assignee, or trustee and an attaching creditor who resides in the state where the attachment proceeding is instituted, the courts of the latter state will protect its own citizen." Cf. *Heyer v. Alexander*, 108 Ill. 385; *Rhawn v. Pearce*, 110 Ill. 350.

In *May v. First Nat. Bank*, 123 Ill. 551, a New York firm made an assignment for the benefit of creditors, executed in conformity with the Illinois statute for the conveyance of real estate and conveying land in Cook county, Illinois, and recorded in the recorder's office of that county on July 28, 1884. On August 23, 1884,

a bank in Massachusetts commenced an attachment suit against said firm in Cook county and levied the writ upon said land; the assignee interpleaded and set up the deed of assignment, and it was held that the deed of assignment was valid as against the Massachusetts creditor, it not being in contravention of the Illinois laws or public policy. The contest was solely between an assignee in a voluntary assignment executed by a nonresident debtor and a foreign attaching creditor. To the same effect are *Juilliard v. May*, 130 Ill. 87, and *Woodward v. Brooks*, 128 Ill. 222, 3 L. R. A. 702. But see *Townsend v. Cox*, 151 Ill. 63, where a different rule is applied to a foreign statutory assignment.

¹ A foreign receiver of a corporation cannot enforce a claim against a resident debtor to the prejudice of domestic creditors or a nonresident creditor who has obtained judgment. *Stockbridge v. Beckwith*, 1 Del. Ch. 72, 2 Am. & Eng. Corp. Cas. N. S. 554.

A foreign receiver will not be permitted to maintain a suit against assets of an insolvent debtor in Illinois as against an Illinois creditor, but this restriction does not apply to a receiver of such corporation appointed in this state, even though the receiver is appointed on application of a foreign creditor. *Holbrook v. Ford*, 153 Ill. 633.

A bill will not lie in favor of a foreign receiver to restrain the levying of execution under judgments

(e) A foreign receiver of a mutual insurance company may maintain in a foreign state a suit against a member of such company to recover an assessment upon a premium note forming part of the assets of the company in the hands of the receiver when the assessment was made.¹

(f) A receiver suing in a foreign state must allege and show that the corporation has been dissolved, or is otherwise disabled from bringing suit, or that the officers of the corporation at the time or prior to the commencing of suit either negligently or wilfully failed or refused to protect the corporate assets. The authority must be alleged in traversable form, and be proved on the trial.²

against the corporation recovered in the state on money in the hands of a debtor of the corporation within the state. *Stockbridge v. Beckwith*, 1 Del. Ch. 72.

The domestic creditors of an insolvent foreign corporation are entitled to payment from property of the corporation located in the state, before turning over such property to a foreign receiver of the corporation. *Corn Exch. Bank v. Rockwell*, 58 Ill. App. 506.

A foreign creditor will not be permitted to assign his claim to a resident creditor for the purpose of gaining the advantages of a resident creditor. *State Bank v. First Nat. Bank*, 84 N. J. Eq. 450.

A receiver obtaining a judgment against a debtor in the jurisdiction of his appointment may sue on such judgment in a foreign state, but he does so as a judgment creditor and not as a receiver. *Wilkinson v. Oulver*, 25 Fed. Rep. 639.

¹ *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.* 108 Ill. 817; *Oaim-mell v. Sewell*, 5 Hurlst. & N. 728; *Clark v. Connecticut Peat Co.* 85 Conn. 803; *Pond v. Cooke*, 45 Conn. 126; *Taylor v. Boardman*, 25 Vt. 581;

Grapo v. Kelly, 83 U. S. 16 Wall. 610, 21 L. ed. 480; *Waters v. Barton*, 1 Coldw. 450. See *contra*, *Humphreys v. Hopkins*, 81 Cal. 551, 6 L. R. A. 792. But it has been held that a foreign receiver cannot recover property he never had possession of at any time. *Commercial Nat. Bank v. Motherwell Iron & S. Co.* 95 Tenn. 172, 29 L. R. A. 164.

² *Parker v. Stoughton Mill Co.* 91 Wis. 174. In such case the decree by which the assessment is made is conclusive on the members of the company, unless attacked in a direct proceeding, notwithstanding they were not present when the decree was rendered. *Hawkins v. Glenn*, 181 U. S. 819, 33 L. ed. 184; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 211; *Rand, McN. & Co. v. Mutual F. Ins. Co.*, *Parker*, 58 Ill. App. 528.

³ Such a decree is not open to collateral attack. *Griggs v. Becker*, 87 Wis. 213. But see *Great Western Teleg. Co. v. Burnham*, 79 Wis. 47. In a proceeding by a receiver in a foreign state to recover an assessment it must be shown that he has authority to bring the action, either by the order of appointment or by the statutes of the state where he is appointed, or

§ 241. Collateral attack of receiver.

Where a receiver brings suit as receiver of a corporation against one of its debtors the validity of his appointment cannot be attacked by the debtor in such proceeding. It is a collateral attack and while the order might have been erroneous, and subject to reversal on appeal it cannot be impeached or disregarded in such proceeding. The application may be inadequate under the law and practice of the court, yet if the court has power to decide the question involved, in other words has jurisdiction of the subject-matter, it is immaterial whether the decision is correct or incorrect. It is not a question that goes to the jurisdiction of the court.¹ But the rule is otherwise if the decree appointing the receiver is void. A void decree is void in every proceeding wherever invoked, but a voidable decree is valid and binding everywhere until set aside in a proper proceeding for that purpose.²

that the assets had been assigned to him. *Swing v. White River Lumber Co.* 91 Wis. 517.

Edee v. Strunk, 85 Neb. 307; *Springs v. Bowery Nat. Bank*, 63 Hun, 505; *Bangs v. McIntosh*, 28 Barb. 591; *Rockwell v. Merwin*, 45 N. Y. 166; *Griesel v. Schmal*, 55 Ind. 475. Where the receiver has general power conferred upon him to sue he may do so in a foreign jurisdiction, that is to say, the power is not limited to the jurisdiction of the court where he is appointed. *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 174. Neither is the power confined to state courts in which the appointment is made, but extends to Federal courts as well. *Chambers v. McDougal*, 42 Fed. Rep. 694.

¹*Davis v. Shearer*, 90 Wis. 250; *Peck v. Beloit School Dist. No. 4*, 21 Wis. 528; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Bangs v. Duckinsfield*, 18 N. Y. 595; *Vermont & O. R. Co. v. Vermont O. R. Co.* 46 Vt. 795; *Tolman v. Jones*, 114 Ill. 155. A writ of prohibition will not lie to prevent the examination of a charge of contempt in a pending proceeding

merely on the ground that the petition in the proceeding does not state a cause of action, or is otherwise defective. *State, Hoffman, v. Scarritt*, 128 Mo. 331. And see *Yore v. San Francisco Super. Ct.* 108 Cal. 431.

²*People v. Weigley*, 155 Ill. 491. In this case on the application of a stockholder a receiver was appointed over the property of a corporation, and subsequently an execution was levied on a portion of the corporate property. A rule was entered against the judgment creditors and their attorneys to show cause why they should not be attached for contempt of court, and after answer they were found guilty and sentenced to jail. The court held that there was not sufficient ground for the dissolution of the corporation and appointment of a receiver, and the appointment was void, and therefore no contempt committed. "Having no general equity powers in the case and the bill wholly failing to bring it within the provisions of § 25, the superior court exceeded its jurisdiction in making the order which appellees are charged with

A receiver cannot maintain a suit in the jurisdiction of his appointment against the purchaser of the real estate of the corporation which is located in another jurisdiction, for the purpose of determining the title thereto.¹ Upon the same principle he cannot avoid liens acquired by creditors after his appointment upon property located in a foreign jurisdiction, if the liens are acquired in accordance with the laws and policy of the state where acquired.²

Where the receiver has obtained leave to sue he is not to be restrained from prosecuting his suit by injunction from another court, or by making him a party to another suit and there enjoining him. The proper place to restrain him is by application to the court appointing him.³

§ 242. Receiver's possession.

The possession of the receiver of a corporation is not materially different from the possession of the ordinary receiver. It has already been observed that his possession will be zealously protected from interference from whatsoever source.⁴ The property being *in custodia legis* cannot be levied on or taken on legal process issued from another court, and any one knowingly violating such right of possession will be guilty of contempt and may be punished therefor.⁵ And it is immaterial that the property may

violating and that order must therefore be held void."

¹*Simpkins v. Smith & P. Gold Co.* 50 How. Pr. 56; *Union Cattle Co. v. International Trust Co.* 149 Mass. 492.

²*City Ins. Co. v. Commercial Bank*, 68 Ill. 348; *Dunlop v. Paterson F. Ins. Co.* 12 Hun, 627, Affirmed in 74 N. Y. 145.

³*Winfield v. Bacon*, 24 Barb. 154; *Van Rensselaer v. Emery*, 9 How. Pr. 138.

⁴Chap. IV. See also *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *Gest v. New Orleans, St. L. & C. R. Co.* 30 La. Ann. 28; *Spinning v. Ohio L. Ins. & T. Co.* 2 Disney, 368; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Thomas v. Cincinnati, N.*

O. & T. P. R. Co. 62 Fed. Rep. 803; *Re Wabash R. Co.* 24 Fed. Rep. 217.

⁵*Taylor v. Gilleun*, 23 Tex. 508; *Abbey v. International & G. N. R. Co.* 5 Tex. Civ. App. 261; *Atty. Gen. v. Continental L. Ins. Co.* 28 Hun, 360, 93 N. Y. 630; *Noe v. Gibson*, 7 Paige, 513; *Albany City Bank v. Schermerhorn*, 9 Paige, 372; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. Rep. 687; *Jackson v. Lahoe*, 114 Ill. 287; *Richards v. People*, 81 Ill. 551; *Watkins v. Minnesota Thresher Mfg. Co.* 41 Minn. 150; *Hazelrigg v. Bronaugh*, 78 Ky. 62; *Hagedon v. Bank of Wisconsin*, 1 Pinney, 61; *Smith v. New York Consol. Stage Co.* 18 Abb. Pr. 419; *McGowan v. Myers*, 66 Iowa, 99; *Maynard v. Bond*, 67 Mo. 315;

be beyond the jurisdiction of the court, provided the court has jurisdiction of the person of the one interfering with the possession.' The court may also restrain litigation or proceedings against its receiver or the corporation over whose property he is appointed.' The general rule, however, is that the failure to ob-

Field v. Jones, 11 Ga. 418; *Steele v. Sturges*, 5 Abb. Pr. 442; *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *Noyes v. Rich*, 52 Me. 115; *Bell v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 785; *East Tennessee, V. & G. R. Co. v. Atlantic & F. R. Co.* 49 Fed. Rep. 608, 15 L. R. A. 109; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Re Schuyler's Steam Tow Boat Co.* 186 N. Y. 169, 20 L. R. A. 891; *Skinner v. Maxwell*, 68 N. C. 400.

As we have seen elsewhere the receiver's title or right to possession relates to the date of the order (Chap. IV.), and not to the date of filing the receiver's bond. See also *Maynard v. Bond*, 67 Mo. 315; *Anglo-Italian Bank v. Davies*, L. R. 9 Ch. Div. 275; *Ex parte Evans*, L. R. 18 Ch. Div. 252; *Steele v. Sturges*, 5 Abb. Pr. 442; *Rutter v. Tallis*, 5 Sandf. 610; *Re Berry*, 26 Barb. 55. But see, as to rule in Virginia, *Frayser v. Richmond & A. R. Co.* 81 Va. 388.

It should be noticed in this connection that frequently by statute the receiver is vested with the title to the corporate property. *Middlesex County Freeholders v. State Bank*, 29 N. J. Eq. 268; 2 N. Y. Rev. Stat. 461, § 41; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 488; *American Nat. Bank v. National Ben. & C. Co.* 70 Fed. Rep. 420; *Security Sav. & T. Co. v. Piper* (Idaho) 40 Pac. 144; *People v. Weigley*, 155 Ill. 491.

Even where a lien exists on property at the time of the appointment the holder of such lien has no right to interfere with the receiver's possession without leave of court and cannot dis-

pose of the property and convey a good title. *Dugger v. Collins*, 69 Ala. 324; *Edwards v. Norton*, 55 Tex. 410; *Winwall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322; *Hills v. Parker*, 111 Mass. 510; *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 109.

But see as to a different rule in the matter of real property, *Re Loos*, 50 Hun, 67.

Land in the hands of a receiver cannot be leased by a party to the suit so as to confer any rights on the lessee. *Thornton v. Washington Sav. Bank*, 76 Va. 432.

¹ *Holbrook v. Ford*, 153 Ill. 638, 27 L. R. A. 324; *Sercomb v. Catlin*, 128 Ill. 556; *Chafes v. Quidnick Co.* 13 R. I. 442; *Langford v. Langford*, 5 L. J. Ch. N. S. 60; *Vermont & C. R. Co. v. Vermont C. R. Co.* 46 Vt. 792; *Schindelhols v. Cullum*, 55 Fed. Rep. 885.

² *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Re Christian Jensen Co.* 128 N. Y. 550; *Wilkinson v. North River Const. Co.* 66 How. Pr. 483; *Phoenix Foundry & Mach. Co. v. North River Const. Co.* 33 Hun, 156; *Walton v. Grand Belt Copper Co.* 56 Hun, 211; *Keen v. Breckenridge*, 98 Ind. 69; *De Graffenried v. Brunswick & A. R. Co.* 57 Ga. 22; *Melendy v. Barbour*, 78 Va. 544; *Jones v. Brouse*, 32 W. Va. 444; *Burk v. Muskegon Mach. & F. Co.* 98 Mich. 614; *Steel Brick Siding Co. v. Muskegon Mach. & F. Co.* 98 Mich. 616; *Vanderbill v. Central R. Co.* 48 N. J. Eq. 609; *Palye v. Jewett*, 32 N. J. Eq. 302; *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414; *Parker v. Browning*, 8 Paige, 388.

tain leave to sue the receiver is not a jurisdictional fact, but the party may be liable for contempt.¹

But see *Woerishoffer v. North River Const. Co.* 99 N. Y. 398. There is not entire harmony in the authorities on this subject. It has been held that where there is no attempt in the common-law suit to interfere with the receiver's possession, but the purpose of the suit being simply to establish the amount due, he may be sued without leave of court, there being no restraining order against suits, the question of leave of court not being a jurisdictional fact. See following note.

¹ Mr. Justice Magruder, in *Mulcahey v. Strauss*, 151 Ill. 70 (80), says: "While it is true that it is a contempt of the appointing court to make its receiver a party defendant to a suit without leave first obtained for that purpose, it does not necessarily follow that the court in which suit is brought is without jurisdiction. The appointing court may protect its officer either by punishing the party bringing the suit for contempt, or by enjoining him from bringing suit. But the failure to obtain leave is no bar to the jurisdiction of the court in which the suit is brought. This is certainly true in all cases where there

is no attempt to interfere with the actual possession of the property held by the receiver."

To the same effect are the following cases: *Hills v. Parker*, 111 Mass. 508; *Safford v. People*, 85 Ill. 558; *Blumenthal v. Brainard*, 38 Vt. 407; *Hirshfeld v. Kalischer*, 81 Hun. 606; *Camp v. Barney*, 4 Hun. 878; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Allen v. Central R. Co.* 42 Iowa, 688; *Lyman v. Central Vermont R. Co.* 59 Vt. 167; *Kinney v. Orocker*, 18 Wis. 75; *St. Joseph & D. O. R. Co. v. Smith*, 19 Kan. 225; *Phelan v. Gansbin*, 5 Colo. 14; *Angel v. Smith*, 9 Ves. Jr. 335; *Randfield v. Randfield*, 3 DeG. F. & J. 766. See *contra*, *Winwall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 674; *Thompson v. Scott*, 4 Dill. 508.

But where it is necessary to obtain leave to sue the receiver, and leave is not obtained, the receiver may waive such want of leave by appearance. *Elkhart Car Works v. Ellis*, 118 Ind. 215; *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271; *Hubbell v. Dana*, 9 How. Pr. 424.

CHAPTER XIII.

RECEIVERSHIP OF NATIONAL BANKS.

- § 252. Appointment and power under Act of Congress.
 - (a) Provisions of National Banking Act.
 - (b) Powers of comptroller under.
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- § 253. Power of comptroller to appoint.
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 - (d) Failure to keep place for redemption of notes.
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 - (f) Failure to pay for stock—impairment of.
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 - (j) Failure to pay judgment for thirty days.
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- § 254. Power of receiver of national banks.
- § 255. Receiver's title. National banks.
- § 256. Receiver's liability.
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- § 258. Liability of stockholders.
 - (a) Liability.
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- § 260. Liability of directors.

§ 252. Appointment and power under Act of Congress.

(a) Under the provisions of the National Banking Act of June 3, 1864, and its substantial re-enactment in § 5234 of the Revised Statutes of the United States, power is conferred upon the comptroller of the currency to appoint a receiver over a national bank "on becoming satisfied, as specified in §§ 5226 and 5227, that any association has refused to pay its circulating notes, as therein mentioned, and is in default." It is further provided that the receiver, on giving bond and security, "shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and upon order of a court of record of competent jurisdiction may sell or compound all bad or doubtful debts, and on a like order may sell all the real and personal property of such association on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all

money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings." While provision is thus made for the appointment of a receiver by the comptroller of the currency, upon certain contingencies, yet it must not be supposed that the statute in question de vests courts of equity in proper cases of their jurisdiction to appoint receivers.

See also in this connection Act of Congress of June 30, 1876.

Section 2 of Act of June 30, 1876, provides that when any national banking association shall have gone into liquidation, under the provisions of § 5220, Rev. Stat., the individual liability of the shareholders, provided for by § 5151, may be enforced by any creditor of such association by a bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which the association may have been located or established.

Section 3 of the same act provides that whenever any association shall have been or shall be placed in the hands of a receiver, as provided in § 5234 and other sections of the Revised Statutes, and when, as provided in § 5236, the comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been approved or allowed, as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing, etc., the comptroller shall call a meeting of the shareholders, on notice prescribed, and when a bond shall be presented, conditioned for the payment in full of all claims thereafter presented and allowed, the comptroller and receiver shall transfer and deliver to the stockholders' agent selected the undivided and uncollected assets and property of the association, then on hand, and execute a deed or assignment therefor, which shall discharge the comptroller and receiver from all liability to the association, shareholders, and creditors thereof.

Section 1 of Act of March 29, 1886, provides that the receiver of a national bank may purchase the equities of the bank in cer-

tain property specified, and pay for the same in the manner prescribed.

Under Act of Congress of August 3, 1888, the receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property without leave of court, but such suit shall be subject to the general equity jurisdiction of the court in which the receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

See also Act of August 3, 1892, as to powers of receiver. By this act it is provided that on the continuation of a receiver, as provided, he shall proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the association, and shall possess all the powers and authority, and be subject to all duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remains applicable.

(b) The power conferred on the comptroller to appoint a receiver over a national bank is not exclusive. In cases not within the purview of the statute a receiver may be appointed by a court of competent jurisdiction, the same as in proceedings against any other corporation.¹ In a suit by a minority stockholder, a receiver may be appointed where it is shown that the bank is insolvent and its affairs are being mismanaged to the injury of creditors and stockholders.² The application for the appoint-

¹ In *Irons v. Manufacturers' Nat. Bank*, 6 Biss. 301, it is held that the power conferred by the banking act upon the comptroller of the currency to wind up the affairs of a national bank in certain contingencies does not exclude the authority of a competent tribunal to appoint a receiver in either case. In cases not within the special province of the banking act a national bank may be proceeded against in the same manner as any other debtor or corporation. *Wright v. Merchants' Nat. Bank*, 1 Flipp. 568; *Merchants' & P. Nat. Bank v. Masonic Hall*, 68 Ga. 549, 65 Ga. 608.

² Where a national bank is insolvent and in process of liquidation, and its affairs are being greatly mismanaged by its managing agents, to the injury of creditors and stockholders, and some creditors and stockholders are being favored to the injury of others, a receiver may be appointed at the instance of one of the stockholders not favored. *Elwood v. First Nat. Bank*, 41 Kan. 475.

As to when a receiver will be appointed over a national bank in process of liquidation, see *Watkins v. National Bank*, 51 Kan. 254.

A court of equity has power to ap-

ment, as in other cases, must clearly show danger or loss to the plaintiff, and that the propriety is reasonably free from doubt.¹ The appointment, however, will not be void by reason of defects in the petition which may be cured by amendment.² The effect of the appointment will not be to dissolve the corporation, nor does the bank lose its corporate existence thereby.³ Under the

point a receiver of a state banking corporation on the petition of a stockholder, under Iowa Code, § 2908, providing that on the petition of either party to a civil action, wherein he shows that he has a probable right to or interest in any property which is the subject of controversy, and that such property or its rents or profits are in danger of being lost or materially injured, a receiver may be appointed. *Dickerson v. Cass County Bank* (Iowa) 64 N.W. 395.

And see also *Irons v. Manufacturers' Nat. Bank*, 6 Biss. 301.

Until the comptroller acts the court may appoint. *Wright v. Merchants' Nat. Bank*, 1 Filipp. 588.

¹In *Watkins v. National Bank*, 51 Kan. 254, it is held that before a court shall take the property and business of a liquidating bank from the control of the directors on the application of a stockholder, it must appear that the danger of loss or injury to the rights of the plaintiff are clearly proved and the necessity and right for the appointment free from reasonable doubt.

²The appointment of a receiver of a state bank on the application of a stockholder, which the court had jurisdiction to grant, is not void because of defects in the petition which can be cured by amendment. *Dickerson v. Cass County Bank* (Iowa) 64 N.W. 395.

³The appointment of a receiver for a national bank does not amount to a dissolution of the corporation such as

will prevent the rendition of a judgment against it. *Chemical Nat. Bank v. Hartford Deposit Co.* 161 U. S. 1, 40 L. ed. 595; *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. ed. 832.

The appointment of a receiver of a bank, in proceedings instituted by the attorney general under the California bank commissioners' act to enjoin an insolvent bank from transacting further business, is not authorized by such act providing that the commissioners may be authorized to take such proceedings against the bank as may be decided by its creditors, nor by the general authority of the California Code in relation to the appointment of receivers. *Murray v. American Surety Co.* 70 Fed. Rep. 341.

In *First Nat. Bank v. National Pahquioque Bank*, 81 U. S. 14 Wall. 338, 20 L. ed. 840, it was held that a national bank may be sued in any state, county, or municipal court in the county or city in which it is located, which has jurisdiction in similar cases. The act of the comptroller of currency in appointing a receiver does not work its complete dissolution, but the bank, as a legal entity, continues to exist and may still be sued and sue, where it is necessary that the corporate name shall be used in closing up the business.

In *New York Security Bank v. Commonwealth Nat. Bank*, 2 Hun. 287, it is held that where a receiver of a bank has been appointed under the National Currency Act the bank still continues to exist and a suit is properly instituted

Act of 1876, when a cause exists for the appointment of a receiver, the comptroller, after due examination of the bank's affairs, appoints a receiver who shall proceed to close up such association, and enforce the personal liability of the stockholders, as provided in § 5234 of the Revised Statutes. A certificate of the receiver's appointment from the comptroller is satisfactory evidence of the appointment.¹

(c) Inasmuch as a receiver of a national bank appointed by the comptroller of the currency is an officer of the United States the Federal courts have jurisdiction of an action in his name irrespective of the amount involved or the question of citizenship.²

against it and the defense is made by it.

In *Turner v. First Nat. Bank*, 26 Iowa, 562, it was held, in a proceeding for the adjudication of a claim against a national bank that has suspended, that a bank and receiver may both be sued jointly.

In *Green v. Walkill Nat. Bank*, 7 Hun, 68, it was held that the appointment of a receiver of a national bank did not dissolve a corporation and that a suit might be brought against both the bank and the receiver, following the decision in *National Pahquioque Bank v. Bethel First Nat. Bank*, 86 Conn. 325, 81 U. S. 14 Wall. 383, 20 L. ed. 840.

In *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693, it is held that a national bank in voluntary liquidation under the statute is not thereby dissolved as a corporation and may sue and be sued by name for the purpose of winding up its business.

Cf. *National Pahquioque Bank v. Bethel First Nat. Bank*, 86 Conn. 325; *Turner v. First Nat. Bank*, 26 Iowa, 562.

The receiver is an officer of the United States. *Platt v. Beach*, 2 Ben. 308; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476.

In *Gibson v. Peters*, 150 U. S. 342, 37 L. ed. 1104, it was held that a receiver of a national bank is an officer and agent of the United States within the meaning of those terms as used in Rev. Stat. § 380, providing that all suits and proceedings arising out of the provisions of the law governing national banking associations in which the United States or any of its officers or agents are parties, shall be conducted by the district attorneys of the several districts under the supervision of the solicitor of the treasury.

¹ *Platt v. Crawford*, 8 Abb. Pr. N. S. 297; *Platt v. Beebe*, 57 N. Y. 389; *Tapley v. Martin*, 116 Mass. 275; *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

² 24 Stat. at L. 552, chap. 373, § 1, provides: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where the matter exceeds, exclusive of costs, the sum or value of \$2,000, and arising under the Constitution and laws of the United States." State courts have concurrent jurisdiction with the Federal courts in an action brought by a receiver. *Thompson v. Schloetzel*, 2 S. D. 395. In *Cadle v. Tracy*, 11 Blatchf. 101, a suit by a

Under the statute as it formerly existed the United States district courts were given the exclusive jurisdiction in all suits by and against national banks, but under the present statute the receiver may maintain an action in the state courts.¹ When a receiver

resident of Kentucky against a bank incorporated under the National Banking Act and resident in Alabama, was brought by attachment in the supreme court of New York to recover a debt due from the bank to him, and it was held there was no jurisdiction on the ground that the New York court could not acquire jurisdiction, at least *in invitum*, of a suit against a corporation created under the National Banking Act. Cf. *Manufacturers' Nat. Bank v. Baack*, 8 Blatchf. 137. In *Hendee v. Connecticut & P. R. R. Co.* 23 Blatchf. 453, it was held that where a receiver of a national bank appointed by the comptroller has in his possession bonds pledged to the bank to secure a debt, and has obtained from court an order for their sale, and a corporation, a citizen of the state of Vermont, has brought suit in Canada against the receiver to recover the bonds, the Federal Court has jurisdiction of a bill filed by the receiver against the corporation to enjoin it from further prosecuting the Canadian suit, and that such jurisdiction is not taken away by § 4 of the Act of July 12, 1882 (22 Stat. at L. 162). Cf. *Frelinghuysen v. Baldwin*, 12 Fed. Rep. 395; *Price v. Abbott*, 17 Fed. Rep. 506; *Platt v. Beach*, 2 Ben. 303; *Armstrong v. Trautman*, 36 Fed. Rep. 275.

¹ *Washington Nat. Bank v. Eckels*, 57 Fed. Rep. 870.

In *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, it was held that before the act of June 30, 1876, a court of equity had no jurisdiction of a suit to prevent or redress maladministration or fraud against creditors in the vol-

untary liquidation of such a bank, whether contemplated or executed, and that a suit brought by one creditor must necessarily be for the benefit of all; that it was the intention of Congress by the act mentioned to provide ample and effective remedies in all the specific cases for the protection of the public and the payment of creditors, by the application of the assets of the bank and the enforcement of the liability of stockholders. The application of the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statutes made connecting parts of the whole series of transactions which constitute the liquidation of the affairs of the bank.

In *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. ed. 282, it is held that the exemption of national banks from suits in state courts in counties other than the county or state in which the association was located under the act of February 18, 1875, was a personal privilege which could be waived by appearing to such suit.

In *Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. ed. 1003, it was held that an action against a national bank in a circuit court of the United States where all the parties are citizens of the district in which the bank is situated, and the action is not under § 5209 or § 5239 of the Revised Statutes, the circuit court has no jurisdiction.

See U. S. Rev. Stat. § 568; Act of 1882, July 12; Act of 1887, March 3; *Thompson v. Schaetzle*, 2 S. D. 395; *Cadle v. Tracy*, 11 Blatchf. 101; *Ken-*

has been appointed by the comptroller a court of equity has no power to interfere with or control the administration of such comptroller, in respect to the winding-up of the affairs of the bank.¹

§ 253. Power of Comptroller to appoint.

The jurisdiction to appoint receivers of national banks is vested in the comptroller of the currency in the following cases: (a) for failure to keep its stock at minimum; (b) for not keeping its surplus good; (c) for not keeping its reserve good; (d) for not keeping a place selected for the redemption of its notes; (e) for holding its stock over six months; (f) for failure to pay up for its capital stock, and permitting the same to become impaired; (g) for improperly certifying a check; (h) for nonpayment of its circulating notes; (i) where the bank has been dissolved and its franchises forfeited; (j) for a failure to pay a judgment against it for a period of thirty days; (k) when it has become insolvent.²

While the power vested in the comptroller is discretionary it is at the same time final.³

nedy v. Gibson, 75 U. S. 8 Wall. 498, 19 L. ed. 476. Cf. *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Stanton v. Wilkeson*, 8 Ben. 357; *Peters v. Foster*, 56 Hun. 607.

¹ *Van Antwerp v. Hulburd*, 7 Blatchf. 426.

² See U. S. Rev. Stat. §§ 5141, 5151, 5191, 5195, 5201, 5205, 5208, 5284-5287.

In *Price v. Abbott*, 17 Fed. Rep. 506, it is held that the appointment of a receiver by the comptroller as provided by law is to be presumed to be made with the concurrence and approval of the Secretary of the Treasury.

In an action by the receiver of an insolvent national bank an allegation that on a day named the comptroller of the currency appointed the plaintiff receiver of the bank in accordance with the provisions of the Act of Congress (referring to it), and the plaintiff has taken possession of the assets in-

cluding the demand in suit, is in substance a sufficient allegation of appointment. *Platt v. Crawford*, 8 Abb. Pr. N. S. 297.

³ In *Cadle v. Baker*, 87 U. S. 20 Wall. 650, 22 L. ed. 448, it is held that the appointment of a receiver cannot be inquired into so far as its legality is concerned by a debtor of the national bank in a suit by the receiver. The appointment of the receiver by the comptroller is conclusive until set aside by an application of the bank. To the same effect is *Case v. Marchand*, 28 La. Ann. 60.

In *Platt v. Beebe*, 57 N. Y. 889, it was held that a certificate of the comptroller of the currency, approved and concurred in by the Secretary of the Treasury, reciting the existence of all the facts of which the former is required by the National Currency Act (18 Stat. at L. 99, § 50) to be satisfied to authorize him to appoint a receiver

§ 254. Power of receiver of national banks.

The power of a receiver appointed by the comptroller over a national bank is measured by the terms of the statute, and such powers as are incident to the due and proper performance by him of the functions of his office.¹ His power, under the direction of the comptroller, is express as to the collection of all debts, dues, and claims belonging to the bank, and under the orders of a court of competent jurisdiction he may sell or compound all bad or doubtful debts, and sell all the real and personal property of the bank on such terms as the court shall direct, and may enforce the individual liability of the stockholders when necessary to do so in order to pay the debts, such action being in his own name and against the stockholders individually.² In the latter proceeding,

of a national bank under the provisions of that act, is sufficient evidence of the validity of the appointment in an action by the receiver.

¹ "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced and must precede the institution of the suit by the receiver. The fact must be distinctly averred in all such cases and if put in issue must be proved." *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476; *Adams v. Johnson* ("Bowden v. Johnson") 107 U. S. 251, 27 L. ed. 886; *Platt v. Crawford*, 8 Abb. Pr. N. S. 297. A

receiver appointed by the comptroller is an agent of the United States, and is limited in his functions by the object of the receivership, and the duties which it involves. He cannot sell the property of the bank in the absence of an order of a court of competent jurisdiction, or on terms in conflict with such order. He cannot by an executory contract change the estate of the bank unless authorized so to do under the provisions of the statute and the order of court. And persons dealing with a receiver are bound to take notice of his authority to act, and contract with him at their peril. *Ellis v. Little*, 27 Kan. 707.

A receiver of a national bank has power, in the absence of any direction by the comptroller to the contrary, to agree with a creditor before the debt is barred to waive the statute of limitations in order to induce the creditor not to bring suit. *Bridges v. Stephens* (Mo.) 84 S. W. 555.

² See U. S. Rev. Stat. § 5234; also, *Adams v. Johnson* ("Bowden v. Johnson") 107 U. S. 251, 27 L. ed. 886; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476.

however, the direction of the comptroller is a necessary prerequisite, and his action is conclusive.¹ A receiver has power to

In *Ellis v. Little*, 27 Kan. 707, a receiver appointed by the comptroller of currency was held to be the agent of the United States, and is limited as to his functions by the object of the receivership and the duties it involves. Such a receiver, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order may sell all the real estate and personal property on such terms as the court shall direct; but he cannot sell the property of the bank in the absence of such an order, or upon terms in conflict with the direction of the order. He cannot, as such receiver, charge the estate of the bank with his executory contract unless authorized so to do under the provisions of the National Banking Act and the order of a court of competent jurisdiction obtained under the terms of the act. A receiver directed by a court to sell the assets of a bank "on such terms and in such manner as in his judgment shall be for the best interest of the creditors and all interested in the bank and its assets," is not empowered thereby to exchange, barter, or trade the property of the bank for other or different property. Persons dealing with the receiver of a national bank in his official capacity are bound in law to take knowledge of his authority to act, and where he acts in excess of his authority, the persons with whom he deals contract at their peril, and the estate of the bank cannot be charged for the default or inability of the receiver to perform the contract.

In *Barrett v. Henrietta Nat. Bank*, 78 Tex. 222, it is held that the law regulating the appointment of re-

ceivers of the property of national banks and declaring their powers and duties does not recognize the existence of power in the receiver to contract with an attorney regarding a mortgage held by the bank and give the attorney a portion of the property or money realized.

¹ *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476; *Strong v. Southworth*, 8 Ben. 331. In *Harvey v. Lord*, 11 Biss. 144, it is held that where a bill in the nature of a creditor's bill has been filed under the provisions of the national banking law against the shareholders of a bank to enforce their liability, a suit at law by a receiver appointed by the comptroller cannot be maintained against an individual shareholder to enforce the same liability, while the former suit is pending. In this case the power of the comptroller to appoint a receiver to wind up a national bank where a receiver has been appointed by the court in a creditor's proceeding and steps taken to enforce shareholders' liability, is discussed. See also *Case v. Marchand*, 23 La. Ann. 60.

As to the power of the comptroller of the currency, see *Case v. Small*, 4 Woods, 78, 10 Fed. Rep. 722.

In *Van Antwerp v. Hulburd*, 8 Blatchf. 282, on a demurrer interposed by the receiver it was held that the bonds deposited by the bank with the treasurer were to be held exclusively for the purpose of securing the circulating notes, and it is only the moneys paid over by the receiver under the 50th section which are subject to a dividend. There is no provision in the act authorizing the treasurer to dispose of the residue or surplus proceeds of such bonds in payment of

disaffirm an unlawful act of the bank,¹ and he may remove all liens by attachment which are designed to give preference to creditors in violation of the statute,² and in behalf of creditors and stockholders may sustain an action against the bank directors for a misapplication of the funds of the bank, or the loss thereof through negligence.³ But the receiver is not the representative

the debts of the bank or otherwise. The residuary interest of the bank in the securities as pledged is a part of the assets of the bank, the same as though such securities had been pledged to a private person as collateral security for the payment of an ordinary commercial debt, and a properly appointed receiver, as the representative of the bank, has the right to demand and receive the property so pledged as an asset of the bank in the one case the same as the other.

In *Ellis v. Little*, 27 Kan. 707, it was held that the receiver is the agent of the United States and is limited as to his function by the object of the receiver and the duties which it involves. Such a receiver, under the order of the court of competent jurisdiction, may sell or compound all bad or doubtful debts and may sell all the real and personal property on such terms as the court shall direct, but cannot do so without an order of court. He cannot charge the estate by his executory contract unless authorized so to do by the Banking Act and the order of court under the terms of the act.

In *Casey v. La Société de Crédit Mobilier*, 3 Woods, 77, it is held that the receiver holds only the estate and title of the bank in the assets, but has no greater rights in enforcing their collection than the bank itself would have had. Neither the bank nor its receiver could recover possession of the negotiable securities

pledged by the bank for advances to it on the ground that the pledge was inefficual for want of indorsement of the securities, while at the same time holding on to the assets to secure repayment of which the pledge was given.

¹ *Johnston v. Charlottesville Nat. Bank*, 8 Hughes, 657; *Dowd v. Stephenson*, 105 N. C. 467; *National Secur. Bank v. Butler*, 129 U. S. 223, 32 L. ed. 682; *Weber v. Spokane Nat. Bank*, 50 Fed. Rep. 785; *Winters v. Armstrong*, 87 Fed. Rep. 508; *New Albany v. Burke*, 78 U. S. 11 Wall. 96, 20 L. ed. 155; *Curran v. Arkansas*, 56 U. S. 15 How. 304, 14 L. ed. 705; *Putnam v. New Albany & S. C. J. R. Co.* ("Burke v. Smith") 83 U. S. 16 Wall. 390, 21 L. ed. 361.

² *First Nat. Bank v. Colby*, 88 U. S. 21 Wall. 609, 23 L. ed. 687. Cf. *Tracy v. First Nat. Bank*, 87 N. Y. 523; *Woodward v. Ellsworth*, 4 Colo. 580; *Harvey v. Allen*, 16 Blatchf. 29; *Roberts v. Hill*, 23 Blatchf. 313; *Cadle v. Tracy*, 11 Blatchf. 101.

In *Armstrong v. Scott*, 36 Fed. Rep. 63, it was held that U. S. Rev. Stat. § 5242, makes any payment of money by an insolvent national bank to shareholders or creditors with a purpose of preferring such shareholder or creditor, or for the purpose of evading the disposition of assets, as required by statute, absolutely null and void. Cf. *National Secur. Bank v. Butler*, 129 U. S. 223, 32 L. ed. 682; U. S. Rev. Stat. § 5242.

³ *Movius v. Lee*, 24 Blatchf. 297.

of the government in the sense of having power to subject it to the jurisdiction of the courts.¹

§ 255. Receiver's title. National banks.

The receiver's title to the property and assets of a national bank is, in the main, similar to that of other receiverships, and, as a rule, he succeeds to the title of the bank, and takes its property and assets in precisely the condition it is in at the time of his appointment, subject to all then existing liens thereon, or rights therein.² His powers, however, are much more limited than

¹ In *Case v. Terrell*, 78 U. S. 11 Wall. 199, 20 L. ed. 184, it is held that the receiver of a national bank, where operations have been suspended by the comptroller of the currency for causes specified in the National Currency Act, in no sense represents the government and has no power to subject the government to the jurisdiction of the courts. Neither has the comptroller such power.

² The receiver derives no title to funds held by the bank in trust. *Wells v. Stout*, 38 Fed. Rep. 807. Nor to property in the custody of the bank which it does not own. *Cornbach Bank v. Blye*, 101 N. Y. 308. Personal property of an insolvent national bank in the hands of a receiver appointed pursuant to U. S. Rev. Stat. § 5284, remains exempt from taxation under state laws. *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. ed. 882. This is because the corporate capacity of the bank does not cease on the appointment of a receiver. *First Nat. Bank v. National Pahquioque Bank*, 81 U. S. 14 Wall. 383, 20 L. ed. 840; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476; *National Bank v. Kennedy*, 84 U. S. 17 Wall. 19, 21 L. ed. 554. The right of set-off exists in favor of a defendant against whom a receiver is proceeding to make a debt due from him to the

bank. *Armstrong v. Warner*, 49 Ohio St. 376, 17 L. R. A. 486. The closing of a bank by order of the examiner, the appointment of a receiver, and its dissolution by decree of a circuit court necessarily transfers the assets of the bank to the receiver. The receiver takes the assets in trust for creditors and in the absence of a statute to the contrary subject to all claims and defenses that might have been interposed against the insolvent corporation. The ordinary equity rule of set-off in case of insolvency is that where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the set-off of the debt due on the other, and this rule applies to insolvent national banks. *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059.

In *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, it is held that the closing of a national bank by order of the examiner, the appointment of a receiver, and its dissolution by decree of the circuit court, necessarily transfer the assets of the bank to the receiver who holds the assets in trust for the creditors, and in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed against the insolvent corporation.

those applicable to receiverships of corporations generally, and are confined, as a rule, to the conversion of the property into cash, and the collection of its assets, and placing them in the United States Treasury.¹ Neither has he power to make contracts executory in their nature, except where he has statutory authority therefor and under the sanction of a court of competent jurisdiction.² He, of course, derives no title to property of a third person or corporation that comes to his possession along with other property belonging to the bank.³ Neither does he obtain title to the bonds which are deposited with the Treasurer of the United States as security for the redemption of its circulating notes.⁴ Property held by the bank in trust, or which is impressed with a trust relationship does not pass to the receiver subject to general distribution among creditors.⁵ But in such case the *cestui que*

¹*Ellis v. Little*, 27 Kan. 707.

²*Ellis v. Little*, 27 Kan. 707; *Barrett v. Henrietta Nat. Bank*, 78 Tex. 222.

³In *Corn Ech. Bank v. Blye*, 101 N. Y. 808, a party claiming title to property in the possession of the receiver of an insolvent national bank, which came to his possession with other property belonging to the bank, it was held that, on the refusal of the receiver to deliver possession, the claimant could maintain an action of replevin therefor, such proceeding not being prohibited by U. S. Rev. Stat. § 5242. Nor will the custody of the receiver of such property be protected by injunction.

⁴Where bonds are deposited with the Treasurer of the United States as security for redemption of its circulating notes under the general Banking Act of June 8, 1884, they are not liable for the payment of indebtedness to the general creditors of an insolvent bank; that the receiver of a bank had no control over the bonds as receiver. The residuary interest of the bank in the bonds was part of the assets of the bank, however, which the receiver was entitled to. *Van Antwerp v. Hulburd*, 8 Blatchf. 282.

The court has no jurisdiction to entertain a suit in equity brought by a private person to interfere with or control the administration of the duties of the comptroller of the currency and of the Treasurer of the United States with respect to bonds deposited with the Treasurer to secure the redemption of circulating notes. *Van Antwerp v. Hulburd*, 7 Blatchf. 426.

⁵In *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693, it is held that, as long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust and if a person mixes trust funds with his own, the whole will be treated as trust property, except so far as the holder may be able to distinguish what is his. This doctrine applies to moneys deposited in a bank and to the debt thereby created, as well as to other property.

In *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172, 2 L. R. A. 480, paper was sent to a bank for collection and immediately returned to the plaintiff; the paper was collected and the proceeds mingled with other moneys of the bank instead of being for-

warded to the plaintiff. The bill asked to have the balance due plaintiff paid in full on the ground that the bank, by receiving the paper for collection and immediately returning it, became a trustee and that either its entire property or the money in its vaults became impressed with the trust. *Held*, that if the mingling of the funds was a breach of trust it was a conversion and plaintiff became a simple contract creditor with no preference, and it was immaterial whether or not the bank stood in a fiduciary capacity to the plaintiff, as the facts showed that the money collected could not be traced into any specific investment or fund, but had been undistinguishably mingled with the general assets.

The assets of a bank in the hands of its receivers are impressed with a trust in favor of a city whose moneys were deposited in such bank to the knowledge of the latter's officers, who mingled it with the money of the bank, where assets purchased with such money have come to the hands of the receiver. *Spokane v. First Nat. Bank*, 68 Fed. Rep. 982.

A county has no lien upon or priority in the funds in the hands of a receiver of a national bank, for public funds deposited in the bank by its officers, unless the same money, or assets or property procured by its use, comes into the hands of the receiver, although the estate of the bank has received the benefits of the money, and its assets may have been thereby increased. *Spokane County v. First Nat. Bank*, 68 Fed. Rep. 979.

The owner of a note sent for collection to a bank with which the maker deposits sufficient to meet the note, which is thereupon canceled by the bank and returned to the maker and charged to his account, may collect the amount thereof from the receiver

of the bank who is appointed before the presentation of a draft given by such bank for the amount of the note, where the amount so deposited has not been drawn out. *People v. Merchants' Bank*, 92 Hun, 159.

In *Cragie v. Hadley*, 99 N. Y. 181, it appeared that the plaintiff deposited, in the usual course of business, drafts with the national bank which were credited to the plaintiff on the books. The bank was at the time irretrievably insolvent and its drafts had gone to protest the day before, of which the president of the bank, having control thereof, had full knowledge, and presumably its other officers and agents. The bank kept open until the usual hour of closing on the day of deposit and did not open its doors thereafter, but went into the hands of a receiver. In an action to recover the deposit it was held that permitting the plaintiffs to make it in reliance upon the supposed insolvency of the bank a gross fraud was practised upon the plaintiff and he was entitled to reclaim the drafts or their proceeds. This doctrine was not in contravention of U. S. Rev. Stat. §§ 5234, 5242, in reference to preferential payments, the plaintiff's proceeding being simply to reclaim his own property. Neither the receiver nor any creditor had any equity in the property.

In *Burton v. Burley*, 9 Biss. 258, where the president of a national bank instructed its correspondent to charge up against it the amount of a private note which the latter held against the president in payment of said note, and this was done and account rendered showing the transaction which was accepted by the first bank, it was held that the bank was estopped from denying the correctness of the charge and that a receiver of the bank subsequently appointed had no power to

trust must be able to trace his property or money into the receiver's hands subject to identification.¹ The property being *in custodia legis* cannot be levied on, but the judgment must be certified to the comptroller as other indebtedness.²

§ 256. Receiver's Liability.

The liability of a receiver of a national bank is measured to some extent by the general scope of his powers and duties. His liability is confined to the proper care and custody of the property intrusted to him, and the collection and accounting for the receivership funds, and, his office being statutory, his acts must be governed by the terms and limitations embraced in the statute and such directions and control as the court may exercise. The statutory bank receiver is not charged with the distribution of the receivership assets, such distribution being under the direction of the comptroller under § 5234 of the Revised Statutes.³ As a general rule the receiver is not liable for interest on the claims against the bank,⁴ unless the assets are more than sufficient

disaffirm the transaction which had taken place.

¹In *First Nat. Bank v. Armstrong*, 36 Fed. Rep. 59, a draft was sent to a bank specially indorsed for collection and was paid by the drawee by check, which the bank collected through the clearing house. A memorandum was placed on the bank's cash to indicate that the proceeds of the draft were the property of the sender. The bank closed the next morning and the receiver credited such proceeds to the sender of the draft on the books of the bank. It was held that it could not be traced and identified. Cf. *Commercial Nat. Bank v. Armstrong*, 39 Fed. Rep. 684; *First Nat. Bank v. Armstrong*, 42 Fed. Rep. 198.

In *Illinois Trust & Sav. Bank v. First Nat. Bank*, 15 Fed. Rep. 858, it was held that the *cestui que trust* cannot follow his fund in the hands of an assignee in bankruptcy, or of an executor of such trustee, and is a general creditor, unless he can identify

his fund. The right to follow the trust fund ceases when the means of ascertainment and identification fail, as where it is turned into money and mixed in a general mass of property of the same description.

²*Eastern Nat. Bank v. Vermont Nat. Bank*, 22 Fed. Rep. 186.

³A receiver of a national bank appointed by the comptroller is not accountable in equity to the owner of real estate for rents thereof received by him as such receiver, and paid by him into the treasury of the United States subject to the disposition of the comptroller under U. S. Rev. Stat. § 5234. *Hits v. Jenks*, 128 U. S. 297, 81 L. ed. 156.

⁴In *Chemical Nat. Bank v. Bailey*, 12 Blatchf. 480, the national bank had been declared in default by the comptroller, and a receiver appointed, and a sufficient fund was realized from its assets to pay all claims against it and leave a surplus. It was held that the comptroller ought to allow interest on

to pay the principal, nor for rents collected by him and paid over to the Treasurer of the United States.¹

§ 257. Suits by receiver.

It is a part of the official duty of a national bank receiver to collect the assets of the bank, specific authority being given him for that purpose, and he is not required to obtain an order of the comptroller authorizing such action. This power, however, does not extend to and embrace suits against stockholders to recover stock liability, they not being debtors in contemplation of the statute.² The courts in which national banks may sue and be

the claims during the period of the administration before turning the surplus over to the stockholders. In such case action of *assumpsit* will not lie against the receiver or the comptroller, but is brought against the bank. *Payne v. Gardiner*, 29 N. Y. 146.

In *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. ed. 176, a depositor of a national bank, which had suspended payment and a receiver been appointed, was held to be entitled to interest upon his deposit from the date of his demand. *United States v. Knox*, 111 U. S. 784, 28 L. ed. 603.

The mere appointment of a temporary receiver of a bank pending an action for its dissolution does not raise such an inference of its insolvency as to make the bank liable for interest from the time of such appointment on a noninterest-bearing deposit for which no demand has been made. *Sickles v. Herold*, 149 N. Y. 332, Modifying 15 Misc. 116.

A receiver of a bank cannot be required to pay interest upon a deposit which did not bear interest, from the time of an application to set up such deposit as a counterclaim to a demand against the depositor, where he has earned no interest while the money

remained in his hands. *Sickles v. Herold*, 15 Misc. 116, Modified in 149 N. Y. 332.

¹ In *Hitz v. Jenks*, 123 U. S. 297, 31 L. ed. 156, it was held that a receiver of a national bank appointed by the comptroller of the currency was not accountable in equity to the owner of real estate for rents received by him as such receiver and paid by him into the treasury of the United States subject to the disposition of the comptroller under U. S. Rev. Stat. § 5234. Accruing rents collected and paid into court by a receiver appointed on a bill in equity against the mortgagor and a second mortgagee to enforce the first mortgage, which appears to have been satisfied and discharged, belongs to the second mortgagee so far as the land is insufficient to pay his debt.

² A receiver of a national bank, appointed by the comptroller under the national banking act may sue for demand due such bank in his own name, or in the name of the bank. He is not required to get an order of the comptroller for such purpose. It is a part of his official duty to collect the assets. *National Bank v. Kennedy*, 84 U. S. 17 Wall. 19, 21 L. ed. 554; *First Nat. Bank v. National Pahquioque Bank*, 81 U. S. 14 Wall. 383, 20 L. ed.

sued are regulated by statute,¹ but the provisions of the statute

840. This is not the rule in regard to suits against stockholders who are not ordinary debtors in contemplation of the statute. *Id.*

Persons sued by a receiver appointed by the comptroller under the National Banking Act cannot inquire into the regularity of his appointment. *Cadle v. Baker* 87 U. S. 20 Wall. 650, 22 L. ed. 448. Such receiver is presumed to be appointed with the approval of the Secretary of the Treasury within the meaning of § 2, art. 2 of the Constitution (*Price v. Abbott*, 17 Fed. Rep. 506), and he may sue in any circuit court of the United States regardless of citizenship or the amount involved under U. S. Rev. Stat. § 629, cl. 8 (*Armstrong v. Eitelsohn*, 86 Fed. Rep. 209; *Platt v. Beach*, 2 Ben. 303), and in the supreme court of the state of New York. *Platt v. Crawford*, 8 Abb. Pr. N. S. 297.

In *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476, it was held upon a bill filed under § 50 of the National Banking Act of 1864 by a receiver against the stockholders where the bank had failed to pay its notes that it was indispensable that action on the part of the comptroller of the currency touching the personal liability of the stockholders should precede the institution of any suit by the receiver, and this fact must be averred in the bill.

As to the collection of indebtedness due the bank, see *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Ackerman v. Halsey*, 87 N. J. Eq. 356.

¹In *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. ed. 1144, it is held that national banks may sue and be sued, complain and defend in any court of law and equity as fully as natural persons. Under the National

Banking Act of 1868, it was provided that suits by and against national banks organized thereunder might be brought in any circuit, district, or territorial court of the United States held within the district in which such association may be established, and by the act of June 8, 1864, there was added to this statute "or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." Both of these provisions were carried into U. S. Rev. Stat. § 5198, by the Amendatory Act of February 18, 1875, chap. 80 (18 Stat. at L. 816, 320). Mr. Chief Justice Fuller, after a review of the several acts of Congress and their relation to national banks, says: "Suits by or against national banks might therefore be brought or removed on the ground of diverse citizenship, or of subject-matter, since, as they were created by Congress and could acquire no right, make no contract, and bring no suit which was not authorized by a law of the United States, a suit by or against them was necessarily a suit arising under the law of the United States." See *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 738, 823, 6 L. ed. 204, 224; *Leather Mfrs. Nat. Bank v. Cooper*, 120 U. S. 778, 781, 30 L. ed. 816, 818; *Union P. R. Co. v. Myers* ("Pacífico R. Removal Cases"), 115 U. S. 1, 29 L. ed. 819.

Prior to July 12, 1882, suits might be brought by or against national banks in the circuit courts of the United States in the district where the banks were located, but by the act of that date it was provided that "the jurisdiction for suits hereafter brought by or against any association established under any law providing

do not, in all matters of jurisdiction, extend to receivers.¹ Neither is the power of the receiver to sue confined exclusively to the causes of action provided for by statute,² and while he may

for national banking associations, except suits between them and the United States, or its officers and agents shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun." 23 Stat. at L. 162, 163, chap. 290, § 4. *Whittemore v. Amoskeag Nat. Bank*, 184 U. S. 527, 33 L. ed. 1002.

The national banking association organized under the United States statute can be sued in a state court only in the county or city in which the association is established. *Crocker v. Marine Nat. Bank*, 101 Mass. 240, but see *Cadle v. Tracy*, 11 Blatchf. 101.

¹The receivers of national banks, as such, have not the privilege in all cases of being sued in the United States courts and cannot remove such cases against them from state courts to the United States courts. The court in *Bird v. Cockrem*, 2 Woods, 32, say, "I am not aware of any such prerogative which a receiver of a bank has over other persons."

In *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. ed. 1144, it is held that a national bank located in one state may bring suit against a citizen of another state in the circuit court of the United States for the district wherein the defendant resides by reason alone of diverse citizenship.

Prior to the Act of Congress of July 12, 1882, the circuit court had concurrent jurisdiction with the district court without regard to the amount involved. *Frelinghuysen v.*

Baldwin, 12 Fed. Rep. 395; *Price v. Abbott*, 17 Fed. Rep. 506; *Armstrong v. Killesohn*, 86 Fed. Rep. 209; *Armstrong v. Troutman*, 86 Fed. Rep. 275; *Platt v. Beach*, 2 Ben. 308; *Stanton v. Wilkeson*, 8 Ben. 357; *National Bank v. Kennedy*, 84 U. S. 17 Wall. 19, 21 L. ed. 554; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476.

Under the Act of July 12, 1882, suits by or against a national bank, except suits between them and the United States or its officers and agents, "shall be the same as and not other than the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do a banking business where such national banking association may be doing business when such suits may be begun." See also Act of August 13, 1888. But the citizenship of the bank does not determine the citizenship of the receiver. *Hendee v. Connecticut & P.R. Co.* 26 Fed. Rep. 677.

²A suit by a receiver of a national bank to recover back dividends paid out of capital is one to recover diverted trust funds, resting upon no statute or act of Congress, but upon a fundamental principle of equity, and may be maintained, notwithstanding the remedies provided by the National Banking Act as to the individual liability of stockholders. *Hayden v. Thompson*, 71 Fed. Rep. 60.

A request by some of the creditors of a bank that the receiver appointed in proceedings for its dissolution shall bring an action against defaulting directors furnishes no additional reason for bringing the action in a court of equity. *Higgins v. Tefft*, 4 App. Div. 62.

sue in the United States courts, he is not confined to them, but may properly sue in the courts of the state. He has power to

¹In *National Bank v. Kennedy*, 84 U. S. 17 Wall. 19, 21 L. ed. 554, it is held that a receiver of a national bank appointed by the comptroller of the currency under the 50th section of the National Banking Act, may sue for demands due the bank, in his own name as receiver, or in the name of the bank, and is not obliged to get an order from the comptroller for such purpose. *Kennedy v. Gibson*, 75 U. S. 8 Wall. 506, 19 L. ed. 479; *First Nat. Bank v. National Pahquioque Bank*, 81 U. S. 14 Wall. 383, 20 L. ed. 840.

A suit by a receiver to collect indebtedness due his insolvent bank may be brought properly in a state court. *Platt v. Crawford*, 8 Abb. Pr. N. S. 297. To the same effect are *Case v. Berwin*, 22 La. Ann. 321; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Ackerman v. Halsey*, 37 N. J. Eq. 356. In this case it was held that where a receiver of an insolvent bank refuses to bring suit, a creditor and stockholder may, for the benefit of himself and for such other creditors and stockholders as elect to join, maintain a suit against the president and directors for gross official neglect and mismanagement, whereby the bank was ruined.

Receivers of national banking associations as such have not the privilege in all cases of being sued in the United States courts and cannot remove such cases against them from the state courts to the United States courts. *Bird v. Cockrem*, 2 Woods, 82.

In *Hendes v. Connecticut & P. R. R. Co.* 23 Blatchf. 453, it was held that where a receiver of a national bank appointed by the comptroller has possession of bonds pledged to the bank for a debt and has obtained an order for the sale thereof and a suit is

brought in a foreign country against the receiver to recover the bonds, such suit may be restrained on a bill filed by the receiver. Cf. *Platt v. Beach*, 2 Ben. 303.

In *Yardley v. Dickson*, 47 Fed. Rep. 835, a receiver of a national bank brought suit in the circuit court to recover an indebtedness due the bank without regard to the amount involved.

A receiver of an insolvent national bank is, in the execution of its duties, an agent and officer of the United States, and actions brought by him to recover assessments upon stockholders for the payment of debts of the bank are suits at the common law brought by an officer of the United States under the authority of an Act of Congress, of which cases the circuit court has concurrent jurisdiction with the district court, without regard to the amount sued for. *Price v. Abbott*, 17 Fed. Rep. 506.

In *Frelinghuysen v. Baldwin*, 12 Fed. Rep. 395, it is held that a receiver of a national bank is an officer of the United States, and as such may sue in the Federal courts in the district in which the bank is located.

The appointment of a receiver does not relieve the bank from a suit against it. *First Nat. Bank v. National Pahquioque Bank*, 81 U. S. 14 Wall. 493, 20 L. ed. 843.

In *Movius v. Lee*, 24 Blatchf. 291, it is held that a receiver of a national bank has power to enforce against its directors individual claims for losses incurred through the nonperformance and the negligent performance of their duties in the district court of the United States.

In *Stephens v. Bernays*, 41 Fed.

maintain suits against the bank directors for an abuse of the trust imposed in them as officials of the bank, such as waste and loss of the bank assets.¹ A bank having gone into voluntary liquidation may be sued.²

§ 258. Liability of stockholders.

(a) The power is vested in the comptroller of the currency, in a proceeding to wind up an insolvent national bank, to determine when a deficiency exists, and the propriety of enforcing the individual liability of stockholders, and to what extent it is necessary to enforce such liability, and his determination in the matter is conclusive upon the stockholders.³ His action is a condition

Rep. 401, it is held that district courts have jurisdiction of an action to enforce the liability of a stockholder of an insolvent national bank under U. S. Rev. Stat. § 563, subs. 4. This jurisdiction is not taken away by Act of July 12, 1882, § 4, and Act of August 13, 1888, § 4. See also *Stephens v. Bernays*, 44 Fed. Rep. 642; *Stephens v. Bernays*, 119 Mo. 148.

¹*Briggs v. Spaulding*, 141 U. S. 182, 35 L. ed. 662; *Movius v. Lee*, 24 Blatchf. 291.

²*Ordway v. Central Nat. Bank*, 47 Md. 217; *First Nat. Bank v. National Pahquioque Bank*, 81 U. S. 14 Wall. 383, 20 L. ed. 840.

³*Adams v. Johnson* ("Bowden v. Johnson"), 107 U. S. 251, 27 L. ed. 386; *Young v. Wempe*, 46 Fed. Rep. 354.

The assessment of the comptroller was held to be conclusive upon the stockholders in *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216.

In *Peters v. Foster*, 56 Hun, 607, the levying of an assessment by the comptroller was held to be conclusive upon the debtors and stockholders. See also *Strong v. Southworth*, 8 Ben. 331; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476;

Stanton v. Wilkeson, 8 Ben. 359; *Platt v. Beebe*, 57 N. Y. 339.

In *Keyser v. Hiltz*, 133 U. S. 138, 33 L. ed. 531, a certificate signed by the deputy comptroller of the currency as "acting comptroller of the currency," is held to be a sufficient certificate within the requirements of U. S. Rev. Stat. § 5154.

In *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216, the comptroller assessed against several shareholders a sufficient percentage upon the par value of the stock, and it was held that he had no power to direct a further assessment to supply a deficiency caused by the inability of the receiver to enforce the payment from insolvent shareholders or those beyond his jurisdiction. The liability of stockholders is several and is effected by the failure of other shareholders to pay.

In *Davis v. Weed*, 44 Conn. 569, it was held that by the Act of Congress all stockholders of national banks are liable to assessment in case of insolvency of such bank to the extent of the par value of their stock in addition to the amount invested in such stock, but persons holding stock as executors, administrators, and trustees are not to be personally subject

precedent to the institution of a suit by the receiver.¹ The receiver of an insolvent national bank may bring suit at law if he seeks to recover the whole liability, or in equity if a portion is sought to be recovered.² The defendant stockholder, as a rule, is

to any liability of stockholders, the liability only attaching to the property in their hands.

In *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168, the amount assessed against the stockholder was held to bear interest from the date of the order. See also *Adams v. Johnson* ("Bowden v. Johnson"), 107 U. S. 251, 27 L. ed. 886.

A shareholder who is liable for the debts of the bank is liable for interest on them to the extent to which the bank would have been liable, not in excess, however, of the maximum liability fixed by the statute. *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864.

The decision of the United States comptroller as to the necessity for and the amount of an assessment upon the stockholders of a national bank is conclusive, and cannot be questioned in an action by the receiver of the bank upon the assessment. *O'Connor v. Witherby*, 111 Cal. 523.

In *Pauly v. State Loan & T. Co.* 56 Fed. Rep. 430, a corporation holding shares of stock of a national bank as collateral security for a loan and carried on the books of the bank as a pledgee of the stock, is not subject, on the bank's insolvency, to the statutory liability of a stockholder.

¹ *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864; *Strong v. Southworth*, 8 Ben. 331.

A letter from the comptroller addressed to the receiver directing suit to be brought to enforce personal liability of the stockholders is sufficient evidence of his authority. *Adams v. Johnson* ("Bowden v. Johnson"), 107 U. S. 251, 27 L. ed. 886; *Gatch v. Fitch*, 84 Fed. Rep. 566.

In *Young v. Wempe*, 46 Fed. Rep. 354, it is held that the only thing necessary to allege as to authority is that the comptroller determined that the assessment was necessary and levied it. Since an assessment is conclusive against the stockholders, the assessment may be collected in an action at law.

Assessments by the comptroller were sustained in the following cases:

Thayer v. Butler, 141 U. S. 284, 35 L. ed. 711; *Butler v. Eaton*, 141 U. S. 240, 35 L. ed. 713; *Aspinwall v. Butler*, 133 U. S. 595, 33 L. ed. 779; *Adams v. Johnson* ("Bowden v. Johnson"), 107 U. S. 251, 27 L. ed. 886; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476; *Peters v. Foster*, 56 Hun. 607.

² *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Adams v. Johnson* ("Bowden v. Johnson"), 107 U. S. 251, 27 L. ed. 886.

A suit may be brought under the National Bank Act by the receiver in law or equity to recover from stockholders their stock liability by the receiver. *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498, 19 L. ed. 476.

In *Peters v. Foster*, 56 Hun. 607, it is held that a receiver of a national bank of another state appointed by

entitled to an equitable set-off, in an action brought against him to enforce his stock liability, where the obligations are mutual, growing out of the same transaction, and the bank is insolvent.'

the comptroller will not be treated by the courts of the state of New York as a foreign receiver, but he can sue therein to recover an assessment levied upon the shareholders of the bank.

In *Harvey v. Lord*, 11 Biss. 144, a bill in the nature of a creditor's bill was filed under the provisions of a national banking law to enforce a shareholder's liability, and it was held that the suit could not be maintained against an individual shareholder while the creditor's bill was still pending.

Upon a bill filed, under § 50, by a receiver against the transferor and transferee to enforce liability will lie where it is for discovery as well as relief, the transfer being good between the parties, and only voidable at the election of the complainant. *Adams v. Johnson* ("Bowden v. Johnson"), 107 U. S. 251, 27 L. ed. 886.

In *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, it is held that a receiver of an insolvent national bank on the dissolution of the bank takes the assets in trust for creditors, and in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed against the insolvent corporation. The ordinary equity rule of set-off in case of insolvency is that where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the set-off of the debt due on the other; and there is nothing in the statutes relating to national banks which prevents the application of that rule to the receiver of an insolvent national bank. Thus where a customer of a national bank,

who, in good faith, borrows money of the bank, gives his note therefore due at a future day and deposits the amount borrowed to be drawn against any balance applied to the payment of the note when due, has an equitable but not a legal right, in case of the insolvency and dissolution of the bank and the appointment of a receiver before the maturity of the note, to have the balance of his credit at the time of the insolvency applied to the payment of his indebtedness on the note.

In *Yardley v. Clothier*, 49 Fed. Rep. 387, it was held that a depositor in an insolvent bank, who had indorsed a note that was subsequently discounted by the bank, in a suit by the bank to recover the amount of the note, that he could set off his deposit against this amount when the note matured after the insolvency of the bank. This case is at variance with *Armstrong v. Scott*, 36 Fed. Rep. 63, and *Stephens v. Schuchmann*, 32 Mo. App. 338.

Cf. *Jordan v. Sharlock*, 84 Pa. 366; *Skiles v. Houston*, 110 Pa. 254; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675.

The right of set-off may be waived. *United States Bung Mfg. Co. v. Armstrong*, 34 Fed. Rep. 94.

In *Armstrong v. Warner*, 49 Ohio St. 376, 17 L. R. A. 466, it is held that when the holder of a claim not yet due, arising upon contract, becomes insolvent and transfers the same before maturity and the debtor at the time of the transfer holds a similar claim then due against the assignor, his right of set-off is preserved against the assignee when the latter's cause of action arises. Equity will in general enforce the right of set-off by decreeing the compensation of mutual de-

Suits of this character are properly brought in the district court.¹ It is unnecessary that a person shall have a certificate in order to

mands so far as they equal each other, where they have grown out of the same or connected transactions, or the one has formed in whole or in part the consideration of the other, and the party against whom the set-off is asserted is insolvent. This principle is applied under U. S. Rev. Stat. § 5242, to an insolvent national bank on the ground that the allowance of such a set-off is not the creation of a preference by the bank, but an ascertainment merely of the just amount due on the debtor's obligation and is enforceable against a receiver of the bank.

In *Louis Snyder's Sons v. Armstrong*, 37 Fed. Rep. 18, the same principle was adhered to.

In *King v. Armstrong*, 50 Ohio St. 222, it is held that where a person is entitled to share in the distribution of a trust fund and is also indebted to the fund and is insolvent, his indebtedness may, in equity, be set off against his distributive share; and such right of set-off will not be defeated by the assignment of the claim, though made before the amount of his indebtedness or distributive share is ascertained.

See also *Barbour v. National Exch. Bank*, 50 Ohio St. 90, 20 L. R. A. 192; *Hughitt v. Hayes*, 136 N. Y. 163.

In *Hobart v. Gould*, 8 Fed. Rep. 57, it was held that a stockholder of an insolvent bank who happened to be one of the creditors could not cancel or diminish the assessment made under the provisions of U. S. Rev. Stat. § 5151, by off-setting his individual claim against such liability.

In *Hude v. McVay*, 31 Ohio St. 231, set-off was allowed in an action brought by a receiver of an insolvent national bank.

In *Welles v. Stout*, 38 Fed. Rep. 807, an action was brought by the receiver of an insolvent national bank to recover of a stockholder an assessment on his shares. Set-off was allowed under the peculiar circumstances of the case.

In *Stephens v. Schuchmann*, 33 Mo. App. 333, a suit was brought by the receiver of an insolvent national bank against the indorser of a promissory note and it was held that the defendant could not defend by a claim of off-set for moneys deposited by him in the bank. The receiver in such case succeeds to the rights of the bank existing at the time it goes into liquidation. A claim in favor of the bank which first matures in the hands of the receiver cannot be subjected by way of set-off to a claim which existed against it before the receiver's rights accrued.

Cf. *Jordan v. National Shoe & L. Bank*, 74 N. Y. 467; *American Bank v. Wall*, 56 Me. 167; *Miller v. Franklin Bank*, 1 Paige, 444; *Colt v. Brown*, 13 Gray, 233; *Hade v. McVay*, 31 Ohio St. 231; *Fry v. Evans*, 8 Wend. 530; *Merritt v. Seaman*, 6 N. Y. 168; *Scammon v. Kimball*, 93 U. S. 303, 23 L. ed. 483; *Blount v. Windley*, 95 U. S. 173, 24 L. ed. 424; *Carr v. Hamilton*, 129 U. S. 252, 32 L. ed. 669.

¹ *Movius v. Lee*, 24 Blatchf. 291; *Stephens v. Bernays*, 41 Fed. Rep. 401, 44 Fed. Rep. 642.

State courts have jurisdiction to entertain such an action and the act of the comptroller in levying the assessment is conclusive upon debtors and stockholders; that the receiver is the proper person to sue is held in *Stanton v. Wilkeson*, 8 Ben. 359.

constitute him a stockholder.¹ The liability of a stockholder may be enforced against his executors and administrators,² and also against married women.³

¹ In *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. ed. 702, it is held that a subscription to the stock in a national bank and payment in full of the subscription and the entry of the subscriber's name on the books as a stockholder constitutes the subscriber a shareholder without taking out the certificate. See also *Thayer v. Butler*, 141 U. S. 284, 35 L. ed. 711.

In *Stephens v. Follett*, 48 Fed. Rep. 842, it is held that one who subscribes and pays for a specified number of shares of a proposed increase of the capital stock of a national bank, which increase in fact is never issued, and to whom the bank officials transfer instead the old stock of the bank without the knowledge of the purchaser, or without his consent, is not a shareholder within the meaning of the statute imposing individual liability on shareholders for the debts of the bank. The fact of such subscriber receiving dividends on the old shares does not estop him from denying his liability.

² In *Wickham v. Hull*, 60 Fed. Rep. 326, it is held that the estate of a deceased owner of national bank stock is liable to an assessment levied against his executors where the bank fails after the death of the stockholder. In this case an action was brought against the executors of an estate to establish its liability for an assessment, the estate at the time being in the possession of an Iowa probate court for purposes of administration. The defendant set up the limitation of the Iowa Code, § 2421, in regard to the settlement of estates, and it was held that the proper practice in such cases was to present the claim established in the Federal court

for allowance in the probate proceedings.

In *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, it is held that the statutory liability of a shareholder in a national bank for the debts of the corporation survives against his personal representatives. And that the stockholder's liability continues under the statute until his stock is actually transferred upon the books of the bank, or until the certificate has been delivered to the bank with power of attorney authorizing the transfer and a request made at the time of the transaction to have the transfer made.

See also *Mills v. Butler*, 118 U. S. 655, 30 L. ed. 266.

³ In *Bundy v. Cocke*, 128 U. S. 185, 32 L. ed. 396, a bill in equity was filed in Kentucky by the receiver of a national bank located in Arkansas against a married woman and her husband, who were alleged to be citizens of Kentucky, to enforce against the separate property of the wife an assessment of the comptroller of 50 per cent on the par value of the stock as an individual liability, it appearing that the shares of the stock still remained in the name of the wife upon the books of the bank and that she possessed enough property in her own right to pay the assessment, and it was held that the bill was sustainable as a bill in equity.

Married women are held liable as stockholders for assessments, in *Winters v. Sowles*, 88 Fed. Rep. 700; *Keyser v. Hite*, 133 U. S. 138, 33 L. ed. 531; *Re First Nat. Bank*, 49 Fed. Rep. 120; *Robinson v. Turrentine*, 59 Fed. Rep. 554.

As to the liability of stockholders, § 5205 provides that every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise shall within three months after receiving notice thereof from the comptroller of the currency, pay the deficiency in the capital stock by assessment upon the stockholders *pro rata* for the amount held by each, and in default of payment a receiver shall be appointed.¹ Prior to 1876 the receiver was the only person to

¹In *Mills v. Butler*, 118 U. S. 655, 30 L. ed. 266, shares of the capital stock of a national bank were sold by an auctioneer at public auction and were bid off by B who paid the auctioneer for them and received a certificate of stock with power of attorney for transfer executed blank. The auctioneer paid the money to the former owner of the stock. No formal transfer was made upon the books of the bank. Shortly after the transaction, the bank became insolvent and went into the hands of the receiver, who made assessments against the stockholders under the provisions of U. S. Rev. Stat. § 5205, to pay the deficiency of the capital. A suit was instituted by the receiver against the former owner of the stock, and it was held that his responsibility ceased upon the surrender of the certificate to the bank and the delivery to its president of a power of attorney sufficient to effect and intended to effect, as the president knew, a transfer of the stock on the books.

In *Hayes v. Shoemaker*, 89 Fed. Rep. 319, it was held that where a shareholder makes a bona fide sale of his stock and goes with the purchaser to the bank, indorses his certificate and delivers it to the cashier of the bank with directions to make the transfer on the books, he is thereby discharged from liability and is not

liable, though the cashier fail to make the transfer, upon the subsequent suspension of the bank for an assessment made by the comptroller. Suit was brought in this case by the receiver.

In *Johnson v. Laflin*, 5 Dill. 65, 108 U. S. 800, 26 L. ed. 532, it was held that a shareholder had a right to make an actual, bona fide sale and transfer of his shares to any person capable in law of taking and holding the same and of assuming the assignor's liability in respect thereto; and that, in the absence of fraud, this right is not subject to veto by the directors or other shareholders. When such a transfer is made and entered on the books the assignor ceases to be a shareholder and is free from all liability thereon. As between the seller and purchaser of shares the sale is complete when the certificate of shares is duly assigned with power to transfer the same on the books of the bank and payment therefor is received by the seller.

A receiver of an insolvent national bank is the only party who can maintain a suit in behalf of the creditors to set aside a fraudulent transfer of stock to an irresponsible person, and enforce the individual liability of the transferrer. *Stuart v. Hayden*, 72 Fed. Rep. 402.

In *Turner v. First Nat. Bank*, 26 Iowa, 562, it was held that under the National Currency Act assets in the

sue and recover stock liability;¹ but by the act of June 30 of that year the power was conferred upon creditors of the bank, in the following provision:

"That when any national banking association shall have gone into liquidation under the provisions of U. S. Rev. Stat. § 5220, the individual liability of the shareholders provided for in § 5151 may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof in any court of the United States having original jurisdiction in equity for the district in which the association may have been located or established."²

(b) In an action by the receiver of a national bank to recover from a stockholder his stock liability, it may be shown by the latter in defense of the action (1) that the stock was transferred to him without his knowledge or consent, and not subsequently ratified;³ or (2) that the claim is barred by the statute of limitations;⁴

hands of a receiver which has failed, when reduced to money, must be ratably divided and appropriated to the payment of all legal liabilities of the association, whether such liabilities are debts technically so called, or the result from nonfeasance or malfeasance of the association.

¹ That the receiver may sue to recover stock liability, see *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864; *De-lano v. Butler*, 118 U. S. 634, 30 L. ed. 260; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Kennedy v. Gibson*, 75 U. S. 8 Wall. 493, 19 L. ed. 476; *Welles v. Stout*, 38 Fed. Rep. 807; *Welles v. Larrabee*, 36 Fed. Rep. 866, 2 L. R. A. 471; *Butler v. Aspinwall*, 33 Fed. Rep. 217; *Witters v. Soules*, 32 Fed. Rep. 130, 767; *Price v. Whitney*, 28 Fed. Rep. 297; *Irons v. Manufacturers' Nat. Bank*, 17 Fed. Rep. 308; *Price v. Abbott*, 17 Fed. Rep. 506; *Hobart v. Johnson*, 8 Fed. Rep. 493; *Cass v. Small*, 4 Woods, 78.

The Act of 1876 provides that a

creditor may file a bill in equity to enforce stock liability.

² Act of June 30, 1876 (19 Stat. at L. 63).

A creditor not presenting his claim is not entitled to share in the distribution. *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864; *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591.

³ It appeared that stock was transferred to a person without the knowledge of such person or consent, and it was held that such transfer did not make the transferee liable as a shareholder in the association in the absence of an approval or acquiescence in such transfer, or other ratification thereof, such as an acceptance of benefits, etc. *Keyser v. Hitz*, 133 U. S. 188, 33 L. ed. 531.

⁴ In *Butler v. Poole*, 44 Fed. Rep. 586, in an action by a receiver of a national bank against stockholders for assessments on stock the statute of limitations was properly pleadable.

or (3) a former recovery in a state court for the same liability.¹

A stockholder when sued on his subscription is estopped from denying the validity or existence of the corporation;² nor does a colorable transfer of his stock relieve him;³ nor payments made under a mistake of fact.⁴

¹ In *Butler v. Eaton*, 141 U. S. 240, 35 L. ed. 718, a receiver of a national bank brought suit in the circuit court to recover the amount of an unpaid subscription. The defendant set up a judgment in the state court on the same issue decided in her favor as an estoppel, which defense was sustained.

Rights of stockholders cannot be affected by the acts of the president of a bank after it has gone into liquidation. *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. ed. 564; *Moss v. McCullough*, 5 Hill, 131; *Miller v. White*, 50 N. Y. 137; *McMahon v. Macy*, 51 N. Y. 155; *Trippe v. Huncheon*, 83 Ind. 307.

The expenses of a receivership of a national bank appointed in a creditor's suit contesting a voluntary liquidation of the bank cannot be charged upon the stockholders as part of their statutory liability, but must be paid by the creditors who instituted the proceeding. *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864.

² In *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168, it was held that where a receiver was ordered to collect an amount equal to the full par value of the stock the suit might be brought at law. In such case the stockholder is estopped from denying the existence or validity of the corporation.

³ In *Davis v. Stevens*, 17 Blatchf. 259, a purchaser of stock in a national bank, to conceal his ownership and avoid liability, caused it to be transferred to another person pecuniarily

irresponsible, but it was held that so long as he remains the actual owner he is a shareholder within the meaning of the act of June 3, 1864. Such colorable transfer is void. *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448. See also *Adams v. Johnson* ("*Bowden v. Johnson*"), 107 U. S. 251, 27 L. ed. 386.

In *Germania Nat. Bank v. Case*, *supra*, a party, by way of pledge or collateral security for a loan of money, accepted the stock of a national bank, which he caused to be transferred to himself on its books, and it was held that by so doing he immediately became liable as a stockholder and could not relieve himself from such liability by making a colorable transfer of such stock. The order of the comptroller prescribing to what extent the individual liability of stockholders shall be enforced is conclusive.

⁴ In *Delano v. Butler*, 118 U. S. 634, 30 L. ed. 260, the comptroller appointed a receiver of an insolvent national bank and also made an assessment on the shareholders of 100 per cent on the stock. The shareholder declining to pay, the receiver brought an action at law against him for the assessment on sixty shares of stock standing in his own name. The shareholder thereupon filed a bill in equity to restrain the prosecution of the action, claiming that he was not liable for the full assessment by reason of an increase in the capital stock without the

The receiver's right of recovery is limited to the right of the corporation had no receiver been appointed.¹

§ 259. **Illegal preferences.**

Section 5242 of the United States Revised Statutes renders invalid as preferential all transfers of notes, bonds, bills of exchange, or other evidence of debt, deposits to its credit, mortgages, sureties on real estate, judgments or decrees in its favor, deposits of money, bullion, or other valuable thing for its use, or for the use of any of

knowledge on the part of the stockholder of a deficiency existing, and it was held that the shareholder having received the certificates for the increased stock was liable, and that he was not entitled to a credit upon the assessment by reason of payments having been made by him on a misapprehension, such payments not being under such mistake as a court of equity would relieve him from.

In *Holt v. Thomas*, 105 Cal. 373, a stockholder appeared on the books to be the owner of sixty shares, fifty of which he claimed to have sold to another person, and on suit being brought against him it was held that the stockholder could not, after having voluntarily paid a percentage on the assessment of the sixty shares upon demand of the receiver, recover back money paid on the fifty shares on the ground of a mistake of fact upon ascertaining that a surplus remained after other stockholders had paid their assessment. The payment was voluntarily made with knowledge of the facts and could not be recovered back.

In *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448, it was held that a shareholder was estopped from denying his position as such stockholder of the bank under the circumstances of the case.

¹ In *Winters v. Armstrong*, 37 Fed. Rep. 508, it is held that in an action

by the receiver of a national bank to enforce subscriptions to the proposed increase of its capital stock, an allegation that the bank, subsequent to the defendant's subscription, and with their knowledge, represented to the public by means of circulars, etc., that its capital stock had been so increased and that defendants allowed their names to remain as subscribers to the increased stock, but without alleging that the public gave the credit to the bank on the faith that defendants were part owners of the increased stock, or that they allowed themselves to be held out as actual stockholders, does not show that they are estopped to plead the failure of the bank to comply with the statutory requirements in perfecting such increase. The receiver stands in the shoes of the bank and can assert no right against the subscribers which the bank could not have asserted. A subscriber who has made payments on a subscription to the proposed increase, believing that the requirements would be complied with, is entitled to have the amount thereof allowed as a claim against the assets of the bank in the receiver's hands.

In *Outting v. Damerol*, 88 N. Y. 410, it is held that the receiver in actions by him occupied no better position and had no better right than the corporation over whose property he was appointed.

its shareholders or creditors, all payments of money to either after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by the act, or made with a view to the preference of one creditor to another, except in the payment of its circulating notes.¹ The transfer in contemplation of the act

¹ An insolvent national bank after insolvency has no right to prefer a creditor in violation of U. S. Rev. Stat. § 5242, if such preference is in contemplation of insolvency. And in such case want of knowledge on the part of the corporation receiving such preference is immaterial. *National Security Bank v. Butler*, 129 U. S. 223, 32 L. ed. 682.

In *National Security Bank v. Butler*, *supra*, suit was brought by the receiver of a national bank against another national bank to recover from the latter certain moneys alleged to have been paid to the latter and held by it as a preferred creditor in violation of U. S. Rev. Stat. § 5242. It was held that the transfer of the securities, if made in contemplation of insolvency, was fraudulent under the statute, although there was no such intention on the part of the security bank in receiving the transfer, and although there was no knowledge or suspicion at that time on the part of the security bank that the Pacific Bank was insolvent, or contemplated insolvency, or was not doing business, or that its directors had voted to close it, or that application was to be made for a receiver.

Insolvency is such a condition of affairs that the bank is unable to meet its obligations as they mature in the usual course of business. An act of insolvency takes place when a bank has actually failed to meet some of its obligations. *Roberts v. Hill*, 24 Fed. Rep. 571; *Market Nat. Bank v. Pacific Nat. Bank*, 30 Hun, 50.

It is in contemplation of insolvency when it becomes reasonably apparent to its officers that it will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations. *Id.* If the bank is in contemplation of insolvency it is not necessary that the party to whom the transfer is made should be aware of it. *Case v. Citizens' Bank*, 2 Woods, 23; *Iron v. Manufacturers' Nat. Bank*, 6 Biss. 301. An execution returned *nulla bona* is evidence of insolvency. *Wheelock v. Kosi*, 77 Ill. 296. *Cf. Roberts v. Hill*, 24 Fed. Rep. 571; *Armstrong v. Chemical Nat. Bank*, 41 Fed. Rep. 234; *Wager v. Hall*, 33 U. S. 16 Wall. 584, 21 L. ed. 504; *Casey v. La Société de Crédit Mobilier*, 2 Woods, 77.

The intent to give a preference is presumed when the bank officers know of its insolvency, and, therefore, know it cannot pay all its creditors in full. *Roberts v. Hill*, 24 Fed. Rep. 571, Overruling *Roberts v. Hill*, 23 Fed. Rep. 311. See also *National Security Bank v. Price*, 23 Fed. Rep. 697; *Case v. Citizens' Bank*, 2 Woods, 23, 100 U. S. 446, 25 L. ed. 695; *Sawyer v. Turpin*, 2 Low. Dec. 29.

In *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. ed. 700, it is held that § 130 of chapter 689 of the laws of the state of New York of 1892, providing for the payment by the receiver of an insolvent bank, in the first place, of the deposits in its bank by savings banks when applied to an insolvent national bank, is in conflict with § 5236 of the Revised Statutes of the United States, directing

which is rendered void must be with a view of giving a preference, and not the giving of security for an actual loan,¹ made in

the comptroller of the currency to make ratable dividends of the money paid over to him by such receiver on all claims proved to his satisfaction or adjudicated in a court of competent jurisdiction, and is therefore void when applied to a national bank, and is a preference prohibited by the National Banking Act. This case reverses the case of *Elmira Sav. Bank v. Davis*, 142 N. Y. 590, 25 L. R. A. 546, and also same case in 73 Hun, 357. See also *Venango Nat. Bank v. Taylor*, 56 Pa. 14.

¹In *Re Armstrong*, 41 Fed. Rep. 881, it was held that U. S. Rev. Stat. § 5242, which invalidates all transfers of notes, etc., of a national bank after the commission of an act of insolvency with a view to the preference of one creditor over another does not prohibit a bank which has in good faith accepted a draft of a national bank the day before the latter's insolvency, and afterwards paid the same, from applying the profits of collections made by it in its hands belonging to the insolvent bank to the payment of the draft since its lien on such collections runs from the date of acceptance.

In *Armstrong v. Chemical Nat. Bank*, 41 Fed. Rep. 234, it was held under U. S. Rev. Stat. § 5242, that the section is directed to a preference as in giving security for a debt which is created; and if the transaction be free from fraud in fact and is intended merely to adequately protect a loan made at the time, the creditor can retain the property transferred to secure such loan until the debt is paid, though the debtor is insolvent, and the creditor has reason to believe at the time that to be the fact. A bank

is not in contemplation of insolvency until the fact becomes reasonably apparent to its officers that it will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations. Cf. *Roberts v. Hill*, 24 Fed. Rep. 571; *Tiffany v. Lucas*, 82 U. S. 15 Wall. 410, 21 L. ed. 198; *Cook v. Tullis*, 85 U. S. 18 Wall. 382, 21 L. ed. 933; *Clark v. Iselin*, 88 U. S. 21 Wall. 360, 22 L. ed. 568; *Casey v. La Société de Crédit Mobilier*, 2 Woods, 77.

In *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. ed. 537, it is held that § 8466 of U. S. Rev. Stat. which, in certain cases mentioned, gives the United States priority of payment of debts due to it, does not apply to its demands against an insolvent national bank.

In *Hayes v. Beardsley*, 136 N. Y. 299, an action was brought by a receiver of a national bank to recover payments alleged to have been made by the bank in violation of the National Banking Act, which declared void all transfers of securities and payments made by a bank organized under it "after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets," where it appeared that the bank at the time of the payments was in fact insolvent, and had been so for years, which was known only to the cashier, it was held that the complaint of the receiver was properly dismissed as the plaintiff failed to show that the payments were made in contemplation of insolvency, or to prevent the application of the bank assets as prescribed by law. In this case the insolvency of the bank was concealed by the

good faith.¹ The statute also prohibits attachments of the property of the bank after insolvency.²

§ 260. Liability of directors.

Section 5239, United States Revised Statutes, provides that if the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of title lxii. of National Bank Act, all the rights, privileges, and franchises of the association shall be thereby forfeited, to be determined and adjudged by a proper circuit, district, or territorial court of the United States in a suit brought for that purpose by the comptroller of the currency in his own name before the association shall be declared dissolved. And in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation. Actions for a violation of this section are properly brought by the receiver,³ but inasmuch as the form of action is not prescribed, the

cashier and none of its directors were suspicious thereof, but, under the circumstances, the fact that the defendant was a director did not, as a matter of law, charge him with liability for the payments made to him, he having acted in good faith and in ignorance of the wrongdoing and of the bank's insolvency.

The preference of one creditor to another by a national bank, as contemplated in U.S. Rev. Stat. § 5242, is a preference given to the creditor to secure or pay a pre-existing debt. When a national bank, in embarrassed circumstances and in need of assistance, receives a loan of money or other valuable material aid from a person who knows its embarrassed state, on condition that the party making the loan or giving the aid, shall be secured therefor, and the security is accordingly given on a pledge of part

of the assets of the bank, this is not giving him a preference within the meaning of the statute. *Casey v. La Société de Crédit Mobilier*, 2 Woods, 77; *Clark v. Iselin*, 88 U. S. 21 Wall. 360, 22 L. ed. 568.

¹ *Harvey v. Allen*, 16 Bl. ch. 29; *First Nat. Bank v. Colby*, 88 U. S. 21 Wall. 609, 22 L. ed. 687. And see *Buller v. Coleman*, 124 U. S. 721, 31 L. ed. 567; *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371; *National Shoes & L. Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467.

² In *Briggs v. Spaulding*, 141 U. S. 132, 35 L. ed. 662, a bill was filed by a receiver of a national bank against the directors of the bank seeking to recover from such directors by reason of negligence in the management of the affairs of the bank. The court held that the directors were not to be held responsible simply because they

practice is not uniform as to whether the action shall be at law or in equity. Equity has been held to furnish a more complete and adequate remedy in similar cases under similar statutes,¹ but actions at law have also been maintained.² The managers of a bank are not liable when personally sued by the receiver for alleged

did not prevent the losses during the period they were directors and that it was not their duty as such to go among the clerks and look through the books, or call for and run over the bills receivable. The directors of a bank must exercise ordinary care and prudence in the administration of its affairs and use reasonable supervision over the conduct of the business, but they are not to be shielded from liability because of want of knowledge of wrongdoing if such ignorance is the result of gross intention.

Cf. *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Movius v. Lee*, 80 Fed. Rep. 298.

A suit by a receiver may be maintained in the United States circuit court without reference to citizenship of the parties (*Armstrong v. Trautman*, 86 Fed. Rep. 275), or in a state court, *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

A suit by a receiver cannot be compounded by the comptroller without leave of court. *Case v. Small*, 4 Woods, 78.

Bank officers are not liable for errors of judgment in making loans and discounts in good faith and for what they deemed the best interests of the bank. *Witters v. Sowles*, 31 Fed. Rep. 1.

¹ *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879; *Stone v. Chisolm*, 113 U. S. 303, 28 L. ed. 991; *Crown v. Brainerd*, 57 Vt. 625. And see under this statute, *Briggs v. Spaulding*, 141 U. S. 182, 35 L. ed. 662.

In *Welles v. Graves*, 41 Fed. Rep.

459, it is held that the personal liability of directors of a national bank for a violation of § 5204, by declaring dividends in excess of net profits, and of § 5200, for loaning to separate persons, firms, or corporations, amounts exceeding one tenth of the capital stock, cannot be enforced in an action at law. It is also held that before a suit can be instituted against directors for a violation of the statute it must be adjudged by a proper court, that such acts have been done as authorize the forfeiture of the charter. In this suit the action was instituted and prosecuted by the receiver.

² *Stephens v. Overstole*, 49 Fed. Rep. 771; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479; *Perry v. Turner*, 55 Mo. 418; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Matthews v. Albert*, 24 Md. 527; *Norris v. Johnson*, 84 Md. 485.

In *Stephens v. Overstole*, *supra*, it was held that an action by a receiver of a bank whose charter had been forfeited under the statute against a director is properly brought at law, there being no necessity of invoking the aid of a court of chancery by reason of the nature of the issues involved, or to avoid a multiplicity of suits. In this case it is also held that the right to maintain an action by a receiver under § 5239 against a bank director on account of excessive loans made while the defendant was acting as director, does not depend upon the fact that the comptroller has or has not procured a forfeiture of the bank's charter.

mismanagement in not requiring in their discretion a bond from the president for the faithful discharge of his duty as an official, nor for unsafe or irregular investments made without their knowledge or complicity, and may also plead the statute of limitations.¹ They are liable, however, for receiving deposits when they know, or may readily learn, that the bank is insolvent.²

¹ *Williams v. Halliard*, 38 N. J. Eq. 378.

² *Delano v. Case*, 17 Ill. App. 581; *Oraige v. Hadley*, 99 N. Y. 131; *Oraige v. Smith*, 14 Abb. N. C. 409.

A shareholder cannot maintain a suit against the officers for mismanagement and negligence which causes

the bank to become insolvent and its stock worthless (*Conway v. Halsey*, 44 N. J. L. 462), unless the comptroller and receiver refuse to do so (*Nelson v. Burrows*, 9 Abb. N. C. 280), or where the receiver is a director. *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

CHAPTER XIV.

RECEIVERSHIP OF RAILWAYS.

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§ 270. General—attitude of courts.

Courts are averse to the appointment of a receiver of railway corporations by reason of the fact that such corporations derive their power and franchises from the legislative department of government, and as long as they are faithful to the trusts vouchsafed to them and assumed by them, a co-ordinate department of government is not inclined, without adequate cause, to interfere in their management by taking from the legally constituted authorities the duties vested in them.¹ Besides, the common law

¹ *Gardner v. London, C. & D. R. Co.* L. R. 2 Ch. App. 201. The effect of this decision lead to the adoption of the act of parliament known as the

Railway Companies Act of 1867, under which the high court of chancery was given power to appoint a receiver and manager of railway com-

action of *quo warranto* is adequate and available to correct many of the abuses that arise in the exercise of corporate functions and frequently is resorted to and affords ample protection in many cases of railway management, but would not be adequate in its application to other corporations, joint stock companies, or partnerships. Moreover railway corporations are quasi public in their nature and the public have a corresponding interest in the due and proper exercise of their corporate functions which it is the duty of the courts to recognize and protect, and for this reason, if no other, extreme caution should in all cases be exercised in appointing a receiver over them.¹ In England and in nearly all the

panies, and by the Judicature Act of 1873 this power was transferred to the chancery division of the high court of justice (86 & 87 Vict. L. R. 8, Stat. 307). The court, in *Overton v. Memphis & L. R. R. Co.* 10 Fed. Rep. 866, says: "Undoubtedly there are cases in which a court of equity may, through its receiver, take possession and control of the business of corporations and individuals. But it is a jurisdiction to be sparingly exercised. None of the prerogatives of a court of equity have been pushed to such extreme limits as this and there is none so likely to lead to abuses. It is not the province of a court of equity to take possession of the property and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding." Cf. *Pond v. Framingham & L. R. Co.* 180 Mass. 194.

Considerations of the public interests are controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the

court. *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 848.

¹In *Texas Trunk R. Co. v. State*, 88 Tex. 1, it was held that though the state may not be a creditor, yet the public has such an interest in the proper management of the property of a dissolved corporation as makes it proper for a receiver to be appointed to manage and control its property to the end that it shall be faithfully applied to the public purpose for which the corporation was originally created. In *Meyer v. Johnston*, 53 Ala. 237, it was held that a court of chancery has power independent of statute to appoint a receiver to manage and operate a railroad when such course is indispensable to secure the rights of parties in interest, but it must be a case of urgency.

In *Kelly v. Alabama & O. R. Co.* 58 Ala. 489, it is held: "Railway companies are more than mere private corporations—they are in many respects, and for many purposes, quasi-public bodies, invested with large and peculiar franchises and privileges, and owing important duties, and under varied responsibilities to the public. Hence, courts of equity, in the appointment of receivers over them, act with extreme caution and require a clear case of right and of pressing

states of this country there are now statutory regulations governing the appointment of receivers and especially so regarding receivers of insolvent corporations, and those in process of dissolution.

§ 271. Notice of application.

A receiver of a railway should under no circumstances be appointed without notice to the corporation, if it is practicable so to do, and only the gravest emergency will justify such appointment on an *ex parte* application.¹ The application for the ap-

necessity to induce their interference." Mr. Justice Miller in *Milwaukee & M. R. Co. v. Soutter*, 69 U. S. 2 Wall. 510, 17 L. ed. 900, says: "The appointment of receivers by a court to manage the affairs of a long line of railroad continued through five or six years is one of those judicial powers, the exercise of which can only be justified by the pressure of an absolute necessity." Cf. *American Loan & T. Co. v. Toledo, C. & S. R. Co.* 29 Fed. Rep. 416; *Stevens v. Davison*, 18 Gratt. 819; *Overton v. Memphis & L. R. R. Co.* 10 Fed. Rep. 866; *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201; *Wabash R. Co. v. Dykeman*, 133 Ind. 56; *Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 840.

And while courts are extremely cautious in the matter of the appointment of receivers over corporations, particularly railways, and those owing duties to the public, yet it has been found expedient, if not a necessity, to appoint receivers over quasi public corporations, owing to the fact that their property is not subject to levy and sale under execution, in many cases. *Louisville Water Co. v. Hamilton*, 81 Ky. 517.

Overton Bridge Co. v. Means, 83 Neb. 857; *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184; *Seymour v. Milford & C. Turnp. Co.* 10 Ohio, 476;

Gooch v. McGee, 88 N. C. 59; *Palestine v. Barnes*, 50 Tex. 538; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27, *Ammant v. New Alexandria & P. Turnp. Road*, 13 Serg. & R. 210; *Foster v. Fowler*, 60 Pa. 27; *Leonard v. Brooklyn*, 71 N. Y. 498; *Baxter v. Nashville & H. Turnp. Co.* 10 Lea, 488; *Wood v. Truckee Turnp. Co.* 24 Cal. 474; *Gus v. Tide Water Canal Co.* 65 U. S. 24 How. 257, 16 L. ed. 635. See, *contra*, *State v. Rives*, 5 Ired. L. 297; *Arthur v. Commercial & R. Bank*, 9 Smedes & M. 394.

It must be understood that the above rule applies to that class of property of corporations which is essential to the operation of the road or franchise in which the public has an interest, and does not apply to property owned by the corporation that is not essential to the due and proper performance of its duties to the public.

¹In *Wabash R. Co. v. Dykeman*, 133 Ind. 56, by Ind. Rev. Stat. § 1230 (1881), it is provided "receivers shall not be appointed either in term or vacation, in any case, until the adverse party shall have appeared or shall have had reasonable notice of the application for such appointment, except upon sufficient cause shown by affidavit." The court say: "The statute being silent as to what will constitute a sufficient cause, we must

pointment and the degree of caution required to be exercised has been already considered,¹ but all the primary principles relative to the appointment, and the care of the court in assuming the important functions of operating and managing a railroad, are particularly important in this class of receiverships. Not only the parties to the suit are affected, but a large number of employees are disturbed in their relation to the employer, and the general public along the line of road are liable to be greatly inconvenienced by the disturbance of their shipping facilities.² The application may be made by various parties in interest.³

look to precedents, and adjudged cases to determine that question. The sufficient cause required to be shown must be (1) for the appointment of a receiver at all, and (2) for not giving notice of the application to the adverse party. The statement in verified complaint that there was an emergency for the immediate appointment of a receiver without notice was not a sufficient showing. This was a mere statement of an opinion. The facts on which the opinion was founded should have been pleaded in order to enable the court to judge of its correctness." *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438; *French v. Gifford*, 30 Iowa, 148; *Moritz v. Miller*, 87 Ala. 331.

It was further held that the settled practice now is not to appoint a receiver *ex parte* and thereby deprive the corporation of the possession of its property before it has had an opportunity to be heard in relation to its rights, except in those cases where it is out of the jurisdiction of the court, or none of its officers can be found, or where, for some other reason, it becomes absolutely necessary for the court to interfere before there is time to give notice to the corporation to prevent the destruction or loss of property. Citing the following cases among others: *People v. Albany & S.*

R. Co. 55 Barb. 344, 369; *French v. Gifford*, 30 Iowa, 148, 160; *Bisson v. Curry*, 35 Iowa, 72; *Howe v. Jones*, 57 Iowa, 130; *Cleveland, C. C. & I. R. Co. v. Jewett*, 37 Ohio St. 649; *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622; *Word v. Word*, 90 Ala. 81; *Moritz v. Miller*, 87 Ala. 331; *Martin v. Tarrow*, 43 Miss. 517; *Cook v. Detroit & M. R. Co.* 45 Mich. 453; *Turnbull v. Prentiss Lumber Co.* 55 Mich. 387.

¹ Chap. II.

² In passing upon an application for the appointment of a receiver it is the duty of a court to scrutinize not only the rights asserted by the moving party, but the injuries that may be suffered by the adverse party and the public at large. This is particularly the case where a line of railroad forming part of a system operated as a unit is thereby detached from the main road. In such case not only the parties to the suit are affected, but a large number of employees are disturbed in their relation to the employer, and the general public along the line of road are liable to be greatly inconvenienced by the disturbance of their shipping facilities, especially to remote points. *Wabash R. Co. v. Dykeman*, 133 Ind. 56.

³ See § 272.

In *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694, a bill in

§ 272. When appointed.

A court of equity in the exercise of its chancery jurisdiction, and in the absence of statutory power, on a proper showing by a proper party on due notice, and in the exercise of a sound judicial discretion, may appoint a receiver over a railway:

(a) Where the directors without lawful authority, and without the sanction of the stockholders, have leased the road and its property and placed their management in the hands of another corporation.¹

equity was filed by a judgment creditor of a railroad company against the company, alleging that the property was heavily mortgaged and that, if plaintiff should attempt to secure the payment of his debt by seizure and sale, bidders could not be obtained for more than a nominal amount, and praying for a receiver.

In *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 484, 29 L. ed. 963, affirmed in 28 Fed. Rep. 169, the owners of the majority of the stock together with judgment creditors brought a suit in equity in the state court, praying for a receiver. Subsequently the trustee in some of the mortgages filed a bill in the United States circuit court in Illinois to foreclose their mortgages, after which the proceeding in the state court was removed to the United States court, and subsequently all suits were consolidated.

In *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480, an action was brought in the Circuit Court of the United States for the Western District of Pennsylvania to foreclose mortgages upon the railroad property. An auxiliary action was subsequently brought in the Circuit Court for the Northern District of New York.

In *Brown v. Lake Superior Iron Co.* 134 U. S. 530, 33 L. ed. 1021, the bill was filed by creditors in behalf of

themselves and other creditors whose number was so great as to make it impossible to join them as parties, alleging the insolvency of the defendant, etc.

¹In *Sage v. Memphis & L. R. R. Co.* 5 McCrary, 643, it was held, on the authority of *Overton v. Memphis & L. R. R. Co.* 10 Fed. Rep. 866, that there are cases in which a court of equity may, through its receiver, take possession and control of the property and business of corporations, but it is a jurisdiction to be sparingly exercised. None of the prerogatives of a court of equity have been pushed to such extreme limits as this and none is as likely to lead to abuses. It is not the province of a court of equity to take possession of the property and conduct the business of the corporations except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right which would otherwise be lost or greatly injured and which cannot be protected by any other action or mode of proceeding. Therefore, where it appears that by collusion between a corporation and a creditor a receiver is appointed over the property of the company for the purpose of keeping such property from their creditors, the court will discharge the receiver.

In *Stevens v. Davison*, 18 Gratt. 819,

(b) Where the company has made default in the payment of its mortgage indebtedness,¹ or where default is imminent by rea-

it was held that a board of directors had no authority without the sanction of a lawful meeting of the stockholders to make a lease for years of the railroad and its property with authority to the lessee to operate the road, and charge for carrying upon it. Before a court will appoint a receiver for a railway to manage it such a course must be indispensable to the rights of legitimate stockholders and prevent a failure of justice. *Gardner v. London, O. & D. R. Co.* L. R. 2 Ch. App. 201.

¹ Where the appointment of a receiver is asked to displace the exercise of corporate authority over a railroad courts of equity act with extreme caution and require a clear case of right and of pressing necessity to induce their interference; but when the corporation itself has been declared bankrupt with interest having accumulated upon its bonds exceeding the value of the property mortgaged to secure them and purchasers of the equity of redemption at the assignee's sale are in possession of the road and property mortgaged, receiving the income, profits, and earnings of the road belonging to the mortgagee and using the property for its own exclusive use and benefit, a clear case is presented for the appointment of a receiver. *Kelly v. Alabama & O. R. Co.* 58 Ala. 489.

While a receiver will not be appointed to supersede permanently the managers of a railway and to take charge of the affairs of the road, yet where two railway companies possess a community interest of a property in dispute the court of equity will exercise judicious control over their conduct towards each other, in order

to protect their respective rights. *Delaware, L. & W. R. Co. v. Erie R. Co.* 21 N. J. Eq. 299.

Where it is shown that the railway company in violation of its duty is applying and intending to continue to apply its revenues, which are the only means of paying an annuity, towards the payment of a junior incumbrance, the court ought to interfere, on the application of a prior mortgagee by injunction, and appoint a receiver.

In *Hollenbeck v. Donnell*, 94 N. Y. 842, it was held that the power to appoint a receiver of the rents and profits of mortgaged premises, accruing pending a foreclosure, was inherent in a court of chancery before the adoption of the code of procedure and such power is not abrogated by a subsequent portion of the code defining the case in which a receiver may be appointed. It appeared in this case that about one sixth of the mortgage debt was due and the premises divided into two nearly equal parcels which could be sold separately without injury to the parties interested, and the court held that, assuming the appointment of a receiver of the rents and profits was proper, in the absence of a subsequent pledge plaintiff was not entitled to a receivership for the protection of that portion of the debt not yet due or of that portion of the premises as to which his rights to sell had not accrued and appointed a receiver over one of the parcels.

To authorize the appointment of a receiver of the rents and profits of mortgaged premises it must clearly appear in an action to foreclose the mortgage that the premises are an inadequate security for the debt and that the mortgagor or other person

liable for the debt is insolvent. *Burlingame v. Parce*, 12 Hun, 144.

In *Shepley v. Atlantic & St. L. R. Co.* 55 Me. 395, a railway company by order of its stockholders and directors conveyed its property and franchises to trustees and their survivors by deed to be void upon the payment of certain bonds issued by the corporation. In this deed it was stipulated that a failure to pay interest or principal of the bonds according to their tenor should authorize the mortgagee to take the property into their actual possession and manage and control the same and apply the net proceeds to the payment of such interest and principal due. On a bill filed by the trustees asking for special performance of the trust deed with reference to the possession it was held that the complainants were entitled to the relief and the court by its decree placed the trustees in possession. Cf. *Shaw v. Norfolk County R. Co.* 5 Gray, 162.

In such case the death of one of the trustees does not abate the suit, but the proceedings must be continued until the vacancy is filled. *Shaw v. Norfolk County R. Co.* *supra*.

In *Sage v. Memphis & L. R. R. Co.* 125 U. S. 861, 31 L. ed. 694, it was held that the appointment of a receiver was always within the discretion of the court to be exercised with great caution and with reference to the circumstances to each particular case; that where a bill of equity was filed by a judgment creditor alleging in substance that the property of the company was so heavily mortgaged that if plaintiff should attempt to enforce the payment of his debt by seizure and sale of execution there would be no bidders at more than a nominal amount, presents a case giving the court of equity jurisdiction to appoint a receiver of the property under the peculiar circumstances of the case.

But it was further held that a judgment creditor, or any number of such creditors, are not entitled as a matter of right to have the company's property put in the hands of a receiver, merely because of its failure or refusal to pay its debts. If it appears that such a suit is conclusive and an imposition on the court such receiver will be discharged. Cf. *Pennsylvania Co. for Ins. etc. v. American Const. Co.* 2 U. S. App. 606, 55 Fed. Rep. 131.

In *Williamson v. New Albany etc. R. Co.* 1 Biss. 198, it is said that the appointment of a receiver of a railway company on a foreclosure of a mortgage is not a matter of course on default in the payment of interest, but rests in the sound discretion of the court; and that a court of equity, when its jurisdiction is invoked, will look into the facts and exercise an equitable jurisdiction, and will not enforce the strict penalties of the deed if such a course is not equitable.

In *Allen v. Dallas & W. R. Co.* 3 Woods, 816, it appeared that by a deed of trust the company had mortgaged its income and profits as well as its railway and their property to secure the payment of the principal and interest of its bonds and it authorized its trustees in default of the payment of interest to take possession of the mortgaged property, and apply the income to the payment of the interest. It was held that the application of the trustees should be granted, and that such default was a sufficient ground for the appointment of a receiver.

In *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 260, it is held that where a railway company makes default in the payment of the interest on this mortgage indebtedness, and that the property is inadequate security for the mortgaged debt, the company being insolvent and appropriating its

earnings to its own use, a receiver *pendente lite* will be appointed.

In *Morrison v. Buckner*, Hempst. 444, the general rule is stated to be that the receiver will not be appointed in mortgage cases unless it clearly appears that the security is inadequate, or there is imminent danger of a waste, removal, or destruction of the mortgaged property, or that the earnings and profits have been expressly pledged for the debt. Cf. *Shotwell v. Smith*, 3 Edw. Ch. 588; *Cheever v. Rutland & B. R. Co.* 89 Vt. 658.

In *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 409, it is held that on a default in the payment of interest, and a demand upon the trustees by the bondholders for possession of the trust property, and a failure of the trustees to do so, the court may require them on a bill filed for such purpose to execute the trust and compel them to take possession of the trust property, or may appoint a receiver for that purpose.

In *Whitehead v. Wooten*, 48 Miss. 523, it was held that to justify the appointment of a receiver before notice, strong special reasons must be shown; that a mortgagee is not entitled after default to the earnings and income of the mortgaged premises, nor to a receiver, unless the property is inadequate security, or unless the earnings and income are specifically pledged.

In *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606, it was provided by the mortgage that upon default in the payment of interest for one year, the trustees or the survivors of them should be entitled to take possession of the mortgaged property, hold it, receive and collect the income and profits, and apply the same to certain purposes. It was held that upon the happening of that event, or any action to enforce the specific execution of

the mortgage, that a receiver *pendente lite* might be appointed to operate the road. Cf. *Sacramento P. R. Co. v. San Francisco Super. Ct.* 55 Cal. 453.

While it may appear that there has been a default in the payment of the interest coupons secured by the railroad mortgage, yet if it appear that there is a fair and reasonable claim by the defendant company growing out of contemporaneous contracts that the time of payment has been extended, or that the plaintiffs are precluded from relying on the default, a receiver will not be appointed. The court must first determine whether the right of foreclosure exists. *American Loan & T. Co. v. Toledo, C. & S. R. Co.* 29 Fed. Rep. 416.

In *Baker v. Backus*, 82 Ill. 79, it was contended that the stockholders had a right to have the funds of the company appropriated in discharge of its liabilities and in exoneration of their individual liabilities, and that the neglect of the trustees to make such appropriation was a breach of trust which entitled the stockholders to come into a court of equity, and have the appropriation made, but it was held that the stockholders had no such right in the absence of fraud or collusion, or neglect of duty or indifference by the trustees. The court, under the circumstances of the case, say: "There was no necessity to appoint a receiver because no fraud is alleged or shown, and no sufficient proof that such a step was necessary to save the property from material injury or rescue it from impending destruction."

In *Pond v. Framingham & L. R. Co.* 130 Mass. 194, it was alleged in the bill by creditors that the company was insolvent, that all its property was mortgaged to trustees for the benefit of one class of creditors; that it owed large amounts to other credi-

tors, one of whom had attached all its property; that it was about to execute a lease to an attaching creditor for a long term of years at a rental which would not pay the interest on its indebtedness; that the execution of the lease would be injurious to the interest of its stockholders and creditors. Held that the bill did not state a case within the equity jurisdiction of the court. *Cf. Treadwell v. Salisbury Mfg. Co.* 7 Gray, 393.

In *Rice v. St. Paul & P. R. Co.* 24 Minn. 464, in an action brought to foreclose the mortgage or trust deed it was held that where the plaintiffs had a complete and adequate remedy at law a receiver would not be appointed.

In *Milwaukee & M. R. Co. v. Soutter*, 69 U. S. 2 Wall. 510, 17 L. ed. 900, which was a proceeding to foreclose a mortgage on the railroad and its property where the matter of the amount due under the mortgage was unsettled and fiercely contested, it was held that the appointment of a receiver or refusal to discharge the receiver by the lower courts becomes a judicial error which the appellate court may correct.

In *Wagar v. Stone*, 36 Mich. 364, it is held that in Michigan the mortgagee does not have the legal title to the premises, but merely a security for his debt, and before foreclosure has no legal interest in the mortgaged premises, and is not entitled to possession, and the appointment of a receiver will not be made. *Cf. Hogsett v. Ellis*, 17 Mich. 363; *Ladue v. Detroit & M. R. Co.* 13 Mich. 380; *Van Huse v. Kanouse*, 13 Mich. 303; *Caruthers v. Humphrey*, 13 Mich. 270.

In *St. Louis, K. C. & O. R. Co. v. Devoes*, 23 Fed. Rep. 519, where the title of an unused railroad track was in dispute, both parties claiming possession and neither in the actual

physical possession, it was held that the court of equity would not interfere by the appointment of a receiver even where the defendant had undertaken to obtain forcible possession. The right of possession must first be established.

In *People v. Erie R. Co.* 36 How. Pr. 129, it is held that a receiver could not be properly appointed on the application of a stockholder under the circumstances of the case before the court.

As to the necessary allegations on the part of a creditor and bondholder, see *Ramsey v. Erie R. Co.* 38 How. Pr. 193.

In *Tylen v. Wabash R. Co.* 8 Bls. 247, it is held that the mere fact that a default has been made in the payment of a debt is not ground for the appointment of a receiver in the absence of a provision in the mortgage to that effect, nor will the court appoint a receiver on the application of a small minority of the bondholders where it appears that said action would imperil, if not destroy, the interest of the others whose rights are entitled to equal protection.

In *Belmont v. Erie R. Co.* 52 Barb. 637, it is held that, to enable a stockholder to maintain a bill for the appointment of a receiver, the court has no visitorial power over corporations except such as are expressly conferred by the statute, and a suit will not be maintained by a stockholder for the appointment of a receiver upon allegations of misconduct on the part of some of the directors where other directors are not charged with participating in such misconduct; that the misconduct of some or even all the directors affords no ground for taking away the rights of the stockholders constituting the company.

In *Union Trust Co. v. St. Louis, I.*

son of insolvency,' or where the interest upon the mortgages has been long past due, and the property is inadequate to satisfy the mortgage indebtedness, or taxes have not been paid.'

M. & S. R. Co. 4 Dill. 114, it was held that a mere default in the payment of interest is not sufficient ground for the appointment of a receiver. It is necessary in addition to this to show that ultimate loss will happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree and sale.

In *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* 87 Fed. Rep. 286, it is held that the mere disuse of a manufacturing plant under an agreement with other manufacturers to restrict production, though attended with decay and dilapidation inseparable from disuse, is not such destruction and waste as entitles the mortgagee to a receiver.

In *Rodbourn v. Utica, I. & E. R. Co.* 28 Hun, 369, where the judgment forming the basis of the appointment of a receiver was opened to allow the defendant to appear and defend, but which order directed the judgment and execution to stand as security, it was held that there was no adjudication of the amounts due the plaintiff, and the order appointing a receiver should be vacated.

¹ In *Brassey v. New York & N. E. R. Co.* 19 Fed. Rep. 668, 22 Blatchf. 72, it is held that an insolvent railroad corporation may be put in the hands of a receiver whenever the welfare of the various interests clearly requires it, even though no default has actually been made by the corporation in its obligations, but where the default is imminent and manifest, and the corporation is in peril of a breaking up and the destruction of its business. Cf. *Long Dock Co. v. Mallory*, 12 N. J. Eq. 481.

² *Hopkins v. Worcester & B. Canal Co.* L. R. 6 Eq. 487.

In *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 260, a receiver was allowed on the application of a mortgagee where there was a default in the payment of the interest on the mortgage indebtedness, and the mortgaged property was inadequate security to pay the mortgage debt, and the company was insolvent and appropriated the earnings to its own use. Where there was a stipulation in the mortgage that in case of default in the payment of the interest for sixty days it should be obligatory on the trustees upon a written request of one-third of the bondholders to take possession and sell the road and other mortgaged property. It was held that its remedy in the mortgage was cumulative and not exclusive of the remedies given by law. While the mortgagee may have a remedy at law, yet if such remedy is not adequate, as where the mortgage embraces real, personal, and mixed property, then the appropriate remedy is not in equity. Cf. *Shepley v. Atlantic & St. L. R. Co.* 55 Me. 395; *Hall v. Sullivan R. Co.* 2 Redf. Ry. Cas. 621; *First Nat. L. Ins. Co. v. Salisbury*, 130 Mass. 303; *Warner v. Rising Fawn Iron Co.* 8 Woods, 514; *North Carolina R. Co. v. Drew*, 3 Woods, 713; *State v. Northern C. R. Co.* 18 Md. 193.

In *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 409, there was provision in the trust deed authorizing the trustees, in case the railroad company failed to pay either the interest or the principal of the bonds, to take possession of the property conveyed by the trust deed, advertise, and sell it to pay the amount in default, and it

was held that on a failure of the trustees to perform their duty a bill might be filed by the bondholders requiring the trustees to execute their trust or appoint a receiver for that purpose, and that such appointment would be made though there was no probable deficiency in the trust property to pay the debt secured by the trust deed. The court say: "Where there is a trust fund in danger of being wasted or misapplied, a court of equity will interfere upon the application of any of the creditors, either in his own behalf or in behalf of himself and other creditors, and by the appointment of a receiver, or in some other mode, grant a relief. The appointment of a receiver is not necessarily predicated upon the apprehended loss of the debt. It would be sufficient to allege that the trustees appointed refused to perform the trust. Where there has been negligence or improper conduct on the part of a trustee and the fund is in danger, the appointment of a receiver upon the application of the *cestui que trust* is a matter of right." *Jones v. Dougherty*, 10 Ga. 274; *McDougald v. Dougherty*, 11 Ga. 586; *Jenkins v. Jenkins*, 1 Paige, 248. In this class of cases the application for a receiver is not based upon the deficiency of the trust property but upon the right of the beneficiaries under the deed to have the trust performed according to the intention of the parties.

In *Sacramento P. R. Co. v. San Francisco Super. Ct.* 55 Cal. 458, there was provision in the trust deed that upon default in the payment of the principal, or upon default for one year in the payment of the interest, the trustees should take possession of the property and apply the net income to the payment of the principal and interest of the bonds. Default having been made, an action was brought by the trustees to foreclose

the lease and trust, and a receiver was appointed on this application.

Cf. *Shaw v. Norfolk County R. Co.* 5 Gray, 162; *Shepley v. Atlantic & St. L. R. Co.* 55 Me. 395; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. ed. 144.

In *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606, there was a provision in the mortgage that upon default in the payment of interest for one year the trustees should take possession of the property mortgaged, collect the income and profits arising from it and apply the same for certain purposes. It was held upon the happening of that event a court of equity had power in an action to foreclose under the specific power of the mortgage to appoint a receiver.

In *Allen v. Dallas & W. R. Co.* 3 Woods, 816, it appeared that a deed of trust was executed by the railroad company upon its income and profits as well as its railroad and other property, to secure the payment of the principal and interest of its bonds, and authorized the trustees in default of the payment of the interest to take possession of the mortgaged property and apply the income to the payment of the interest. It was held upon the application of the trustees that such default was sufficient ground for the appointment of a receiver, and that it was not necessary in such cases to show inadequacy, or that the property was in jeopardy, or the insolvency of the company, or that the amount due on the bonds is in dispute. This case is based on the fact that there was a stipulation in the mortgage that the mortgagee shall have the rents in case of default.

Cf. *State v. Northern C. R. Co.* 18 Md. 198; *Dumville v. Ashbrooke*, 3 Russ. 99, note c; *Whitehead v. Woolen*, 48 Miss. 523; *Morrison v. Buckner*, Hempst. 442.

(c) Where the revenues and income of the road are being diverted from their proper application, or misapplied.¹

In *Union Trust Co. v. St. Louis, I. M. & S. R. Co.* 4 Dill. 114, it was held that a court of equity would not appoint a receiver merely upon the showing that there has been a default in the payment of the interest secured by a mortgage upon the property and income of the company, but that upon a default the trustees were entitled to immediate possession, and having made such demand and having been refused possession, it is still necessary to show that ultimate loss will happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree. The facts in this case were held not to exhibit such danger to the bondholders as would warrant the appointment of a receiver, following the case of *Williamson v. New Albany etc. R. Co.* 1 Biss. 198.

In *Tyssen v. Wabash R. Co.* 8 Biss. 247, it is said that the appointment of a receiver in proceedings for foreclosure is a matter resting in the sound discretion of the court, but the mere fact that there has been a default in the payment of the debt is not ground for the appointment of a receiver, in the absence of a stipulation in the mortgage providing that the mortgagee shall have the earnings, and that the court will not interfere, upon the application of a small minority of the bondholders, and appoint a receiver where it appears that such action would imperil if not destroy the interest of others whose rights are entitled to equal protection.

In *Williamson v. New Albany etc. R. Co.* 1 Biss. 198, it is also held that the appointment of a receiver of the property of a railroad company in a foreclosure proceeding is not a matter

of course on default in the payment of the interest.

In *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 36 Fed. Rep. 231, 1 L. R. A. 397, there was a clause in the mortgage providing that in case of demand and default in the payment of interest for six months the trustees might enter upon the property, and it was held that upon default a bill to foreclose might be entertained by the court, though six months' default did not exist. In this case it appeared that the railroad was heavily mortgaged; had made several defaults in the payment of interest, aggregating over one million dollars; that the business was decreasing and liable to continue decreasing from competition with new lines; that it was in need of repairs and improvements and there was want of harmony between the bondholders, and it was held that a receiver was properly appointed.

In *Pullan v. Cincinnati & O. Air Line R. Co.* 4 Biss. 35, it was held that the appointment of a receiver should be made only in strong cases, and that in no case on the foreclosure of a mortgage should a receiver be appointed, if it is clear that on the foreclosure the property will bring enough money to pay the debt, interests, and costs, and that it would be otherwise if it was clearly averred that the mortgaged property was insufficient security for the debt.

¹ *Drewry v. Barnes*, 3 Russ. 94.

In *Kelly v. Alabama & C. R. Co.* 58 Ala. 489, it appeared that the corporation had been declared bankrupt; that interest had accumulated on its bonds exceeding the value of the property mortgaged to secure them; that purchasers of equity of redemption at

(d) Where the income and profits of the railroad as well as its property and franchises are pledged to secure the payment of its bonds, principal and interest, and there is a default in the payment of the interest.¹

the assignee's sale were in possession of the road and the property mortgaged, receiving the income, profits, and earnings of the road belonging to the mortgagee and using the property for their own exclusive use and benefit, and it was held to be a clear case for the appointment of a receiver. *Blatchford v. Ross*, 54 Barb. 42.

In *Des Moines Gas Co. v. West*, 44 Iowa, 236, it was held that where the bond or mortgage pledges the income, rents, or profits to the payment of the debt, the creditor need not conclusively establish his right to recover before he is entitled to ask for the appointment of a receiver; it is sufficient if he shows a probable right to recover; that if in such case the debtor is insolvent the appointment of a receiver follows as a matter of course (see Code, §§ 29-103). *Cheever v. Rutland & B. R. Co.* 39 Vt. 653.

¹ In *Allen v. Dallas & W. R. Co.* 8 Woods, 316, the income and profits were mortgaged as well as the other property, and it was held that a default in the payment of the interest was sufficient ground for the appointment of a receiver. Insufficiency in such cases or insolvency is not involved in the issue.

In *Morrison v. Buckner*, Hempst. 442, the court say: "Now, without adopting this rule (English) to its fullest extent it is proper to observe generally that receivers in mortgage cases will never be appointed unless it is clearly shown that the security is inadequate, or that the rents and profits have been expressly pledged for the debt." *Shotwell v. Smith*, 8 Edw. Ch. 588.

In *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 280, a receiver was appointed upon default in the payment of the interest where inadequate security and insolvency of the company was shown together with the appropriation of the rents.

In *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 409, a receiver was appointed upon default in the payment of interest, but the application was based on the ground that the trustees had failed to perform their duty in regard to taking possession of the property upon such default, as it was held that deficiency in the trust property was not material.

In *Brassey v. New York & N. E. R. Co.* 19 Fed. Rep. 663, 22 Blatchf. 72, a receiver was appointed prior to any default on the securities, but it was shown that a default was imminent and manifest, and the company was entirely insolvent, and unable to pay such interest, and unable to pay its floating indebtedness or borrow money for such purpose.

In *Whitehead v. Wooten*, 48 Miss. 523, it was held that a mortgagee was not entitled after default to the rents and income, nor to a receiver unless the rents and profits were mortgaged, or unless the mortgaged property is insufficient to meet the debt. The court say: "Unless the mortgagee has contracted that he shall have the rents and income after default is made he is not entitled to them, or to a receiver to get them in except in case of the insufficiency of the property to meet the debt."

In *Shepley v. Atlantic & St. L. R. Co.* 55 Me. 395, it was provided in the

(e) Where the officers and directors are mismanaging the business and wasting the property of the corporation, or squandering its money, or embezzling the same.¹

(f) Where by reason of a neglect to elect officers, or otherwise, there is no one competent to take charge of the property of the company.²

(g) Where the company has committed some act which constitutes a statutory cause for revoking its charter or for the appointment of a receiver.³

§ 273. When not appointed.

A court of equity will not appoint a receiver over a railway corporation:

trust deed that a failure to pay interest or principal of the bonds gave the mortgagees the right to take the mortgaged property into their actual possession, and manage and control the same, and apply the net income and profits to the payment of the interest and principal. A specific performance of the contract was asked by the mortgagees, and the court granted the relief. See also *Shaw v. Norfolk County R. Co.* 5 Gray, 162.

In *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606, a receiver was appointed upon a default in the payment of interest for a period of one year on the ground of the action being brought for a specific execution of the mortgage.

In *Sacramento P. R. Co. v. San Francisco Super. Ct.* 55 Cal. 458, a receiver was appointed for the nonpayment of the interest.

In *Doe v. Northwest Coal & T. Co.* 64 Fed. Rep. 928, a receiver was appointed on the ground of insolvency and mismanagement.

¹ In *Blatchford v. Ross*, 54 Barb. 42, a receiver was held to be proper upon the ground that the executive committee of a company had voted them-

selves money in addition to their regular compensation for services as promoters and originators of the company and other parties, and it was held that the action of the committee in this regard afforded ample reason for the appointment of a receiver.

In *People v. Bruff*, 9 Abb. N. C. 158, misconduct by the officers of a corporation was alleged, and it was held to be sufficient ground for the appointment of a receiver. See also *Keeler v. Brooklyn Elev. R. Co.* 9 Abb. N. C. 166.

In *Lawrence v. Greenwich F. Ins. Co.* 1 Paige, 587, where the majority of stockholders neglected to choose officers to take charge of the property, a receiver was appointed on the application of the minority stockholders for the purpose of preserving the property for the benefit of the stockholders generally. Cf. *Andrews v. Powys*, 2 Bro. P. C. 504; *Maguire v. Allen*, 1 Ball & B. 75.

² *Smith v. Dansig*, 64 How. Pr. 320; *Re Louisiana Sav. Bank & Safe Deposit Co.* 85 La. Ann. 196; *Stark v. Burke*, 5 La. Ann. 740; *Dobson v. Simonton*, 78 N. C. 63.

³ *Conro v. Gray*, 4 How. Pr. 165.

(a) In the absence of notice to such corporation of the application, and an opportunity to be heard thereon.¹

¹As a general rule an order for a receiver will not be granted *ex parte* until the time for the defendant's appearance has expired, and the bill has been taken for confessed against him. This is not the rule where the defendant has fraudulently withdrawn himself from the jurisdiction of the court to avoid service of process. *Sandford v. Sinclair*, 8 Paige, 873.

In *Whalpley v. Erie R. Co.* 6 Blatchf. 271, it is held that a receiver cannot be appointed even with the consent of both parties in an improper case.

In *Cook v. Detroit & M. R. Co.* 45 Mich. 453, it is held that a receiver cannot be appointed *ex parte* in a proceeding by creditors to wind up an insolvent corporation and pending the possession on a demurrer, whereby the right to file the bill is put in issue.

In *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201, it is held that it is not necessary for a party defendant to be served with process before the entry of an appeal from an *ex parte* order or demand pending his rights, if such order is the subject-matter of an appeal. It is also held upon the authority of *Verplanck v. Mercantile Ins. Co.* 2 Paige, 450, that it is irregular to deprive the corporation of the possession of its property and corporate rights without its having an opportunity to be heard, and without sufficient cause for such a summary proceeding. The settled practice in ordinary suits is that a receiver cannot be appointed *ex parte* before the defendant has had an opportunity to be heard in relation to his rights, except where he is out of the jurisdiction of the court or cannot be found, or where for some other reason it is absolutely necessary for the court to interfere before there is

time to give notice to the opposite party to prevent the destruction or loss of property. And where the court is asked to deprive a defendant of the possession of his property without a hearing or an opportunity to be heard the particular facts and circumstances which render such a summary proceeding proper must be set forth in the bill or petition on which the application is founded. See also *People v. Norton*, 1 Paige, 17; *Triebert v. Burgess*, 11 Md. 456; *Haight v. Burr*, 19 Md. 134.

In *Cleveland, C. C. & I. R. Co. v. Jewett*, 37 Ohio St. 649, it is said that the appointment of a receiver to take from the defendant the possession of his property cannot be lawfully made without notice, unless the delay required to give notice will result in irreparable loss.

In *People v. Albany & S. R. Co.* 55 Barb. 344, 369, it is said that the order for the appointment of a receiver *ex parte* must have been granted incautiously upon some mistaken oral representation or statement of facts in the case, as it was in clear conflict with the law and settled practice of the court. Cf. *Field v. Ripley*, 20 How. Pr. 26; *McCarthy v. Peaks*, 9 Abb. Pr. 166.

In *Hove v. Jones*, 57 Iowa, 180, the appointment of a receiver in vacation and without notice to the adverse party was held to be clearly erroneous. Cf. *French v. Gifford*, 30 Iowa, 148; *Bisson v. Curry*, 35 Iowa, 72.

See also *Blondheim v. Moore*, 11 Md. 364, where it is held that in order to justify the appointment of a receiver it must appear that the claimant has title to the property and the court must be satisfied that a receiver is necessary to preserve such property.

(b) In the absence of statutory authority and when the application is based on the insolvency of the corporation alone, no fraud or breach of trust being alleged.¹

(c) In foreclosure cases when it does not clearly appear that

The court will never appoint a receiver merely because the measure can do no harm and that fraud or imminent danger, should any be apparent, must be clearly proved. Unless the necessity be of the most stringent character the court will not appoint a receiver until the defendant is first heard in response to the application. See also to the same effect, *Triebert v. Burgess*, 11 Md. 452; *Voshell v. Hynson*, 26 Md. 83; *Smith v. Port Dover & L. H. R. Co.* 12 U. C. App. 288; *Rogers v. Dougherty*, 20 Ga. 271.

In *McLean v. Lafayette Bank*, 3 McLean, 503, it is held that the notice of motion to appoint a receiver is necessary when counsel for opposite party is not present in court.

In *Whitehead v. Wooten*, 48 Miss. 523, it is held that, to justify the appointment of a receiver before answer filed or *pro confesso* taken, there must be strong special reasons given as where the defendant has withdrawn himself from the jurisdiction of the court to avoid service, or is guilty of fraud endangering the property.

In *People v. Albany & S. R. Co.* 7 Abb. Pr. N. S. 265, it is held that a receiver should not be appointed *ex parte* except where the defendant is out of the jurisdiction of the court and cannot be found, or it is necessary to interfere before there is time to give notice to prevent destruction or loss of property.

¹In *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 27 Fed. Rep. 147, it is said that the appointment of a receiver rests in the sound discretion of

the court and that mere insolvency may or may not call for such action.

In *New Foundland R. Const. Co. v. Schack*, 40 N. J. Eq. 222, the allegations of the bill were that the company was insolvent and had suspended its business for want of funds to carry on the same and it was held that the allegations were not sufficient for the appointment of a receiver. The facts and circumstances must be set out from which the insolvency of the corporation shall appear. See also *Rawnsley v. Trenton Mut. L. Ins. Co.* 9 N. J. Eq. 95, 347; *Baker v. Backus*, 32 Ill. 79.

In *Pond v. Framingham & L. R. Co.* 120 Mass. 194, a bill in equity was filed by the creditors of the railway corporation alleging that the corporation was insolvent; that all its property was mortgaged to trustees for the benefit of one class of creditors; that it owed large amounts to other creditors, one of whom had attached all of its property; that it was about to execute a lease to the attaching creditor for a long term of years at a rental which would not pay the interest on its indebtedness and that the execution of the lease would be injurious to the interest of its creditors and stockholders. It was held that the bill did not state a case within the equity jurisdiction of the court, in the absence of allegations of fraud or breach of trust or other ground of jurisdiction, which bring the case within the established equity powers of the court of chancery.

the conditions of the mortgage have been broken or the right to foreclose is doubtful.¹

(d) When the application is in behalf of a small minority of the bondholders and it appears that the interests of the majority bondholders would be prejudiced thereby.²

(e) When there has been a default in the payment of interest, but it does not appear that there will be a loss to the beneficiaries under the mortgage by permitting the road to remain in the hands of the mortgagor until decree and sale.³

¹ In *Briarfield Iron Works v. Foster*, 54 Ala. 622, it is held that while no unbending rule can be declared applicable to every case in which the appointment of a receiver is sought, yet a receiver should not be appointed in the first instance on the assertion of a disputed right and the defendant displaced from the possession of property when the required protection can be given by a writ of injunction or equitable attachment, where the party injured may have the benefit of a bond.

In *Pullan v. Cincinnati & O. Air Line R. Co.* 4 Biss. 85, it is held that while the appointment of a receiver is generally within the sound discretion of the court, yet it is a power only to be exercised in strong cases; that in no case of a mortgage ought a receiver to be appointed if it is clear that on a foreclosure the mortgaged property will bring enough money to pay the debt, interest, and costs.

In *American Loan & T. Co. v. Toledo, C. & S. R. Co.* 29 Fed. Rep. 416, it is said that although there has been a default in the payment of the interest coupons secured by the mortgage, yet if it appear that there is a fair and reasonable claim by the defendant company growing out of contemporaneous contracts; that the time of payment has been extended or that the plaintiffs are precluded from re-

lying upon the default, a receiver will not be appointed until the court shall determine that the right to foreclose exists. Mere disagreement of the parties is not sufficient ground for the appointment of a receiver.

Mere default in the payment of the debt is not ground for the appointment of a receiver in the absence of a stipulation in the mortgage that the mortgagee shall have the rents. *Tyssen v. Wabash R. Co.* 8 Biss. 247.

² In *Tyssen v. Wabash R. Co.* 8 Biss. 247, it was held that the court would not, in deference to the mere technical rights of a very small minority of bondholders, appoint a receiver where it appears that such action would imperil, if not destroy, the interest of others whose rights are entitled to equal consideration. In making the appointment it must be apparent to the court that much greater injury would result to those interested in the railway by not appointing than by leaving the property in the hands of the persons then holding it and especially so where it appears that a funding plan is being negotiated.

³ If the plaintiff has a complete and perfect remedy at law in respect to the matters complained of in the bill, a receiver will not be appointed. *Rice v. St. Paul & P. R. Co.* 24 Minn. 464.

If the security is ample a receiver

- (f) When the plaintiff has an adequate remedy at law.¹
 (g) When by statute, on the dissolution of a corporation, the

will not be appointed before a decree and sale, though provision may be made therefor in the mortgage. *Degener v. Stiles*, 6 N. Y. Supp. 474; *Williamson v. New Albany etc. R. Co.* 1 Biss. 198.

In *Blair v. St. Louis, H. & K. R. Co.* 20 Fed. Rep. 848, it is said: "A court should not, on mere default of interest on bonds, take possession of a railway and substitute a receiver of its appointment to do what the corporate authorities, more familiar with its interests, could better do. In the absence of fraud, incompetency, etc., the court, pending a proceeding for a foreclosure, under ordinary circumstances will not take possession through its receiver of the corporate property and substitute its officer in the place of the corporate officers. * * * The sole object in ordinary cases of foreclosure, if the corporate authorities in possession are incompetent, is to put the property in a receiver's hands for the interest of all concerned in the litigation, viz., stockholders, mortgagees, other lien creditors, creditors at large, etc. Courts should not interfere with the custody and management of the business of the corporation through its corporate officers, pending litigation, except for cause shown."

In Michigan it is held where the mortgagor is entitled under the statute to the possession, and consequently to the rents and profits of the mortgaged premises until such a time as he is divested by a perfected foreclosure, it is not competent to cut short his rights in this regard by means of a receiver. *Wagar v. Stone*, 86 Mich. 364; *Hazeltine v. Granger*, 44 Mich. 508; *Beecher v. Marquette & P. Rolling Mill Co.* 40 Mich. 307. It

is different, however, where the mortgagor voluntarily puts the mortgagee in possession. *Reading v. Waterman*, 46 Mich. 107. The above cases are based on the settled doctrine that a mortgage conveys no title to the mortgagee, the mortgage being a security for the debt only until the title passes by a foreclosure and sale of the property. See *Hogsett v. Ellis*, 17 Mich. 363; *Ladue v. Detroit & M. R. Co.* 13 Mich. 380; *Van Husean v. Kanouse*, 13 Mich. 303; *Caruthers v. Humphrey*, 12 Mich. 270.

In *Union Trust Co. v. St. Louis, I. M. & S. R. Co.* 4 Dill. 114, it is held that in a foreclosure it must be shown that loss will happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree and sale.

¹In *Rice v. St. Paul & P. R. Co.* 24 Minn. 464, where the facts show the plaintiff to have a complete and adequate remedy at law, the court refused to appoint a receiver.

In *Erie R. Co. v. Delaware, L. & W. R. Co.* 21 N. J. Eq. 282, it appeared that defendants in common of an easement disagreed as to the use of a tunnel jointly and the court held that it had jurisdiction in such circumstances of the subject-matter, but that under the peculiar circumstances it was not deemed necessary or advisable to appoint a receiver or manager of the tunnel.

In *Blondheim v. Moore*, 11 Md. 365, the court, after a review of previous decisions, lays down the following propositions:

- (1) That the power of appointment is a delicate one and to be exercised with great circumspection.
- (2) That it must appear the claimant

directors or officers are made trustees for the closing up of the affairs of the corporation.¹

has title to the property, and the court must be satisfied that a receiver is necessary to preserve the property.

(3) That there is no case in which the court appoints a receiver merely because the measure can do no harm.

(4) That fraud or imminent danger, if the immediate possession should not be taken by the court, must clearly be proved.

(5) That unless the necessity be of the most stringent character the court will not appoint until the defendant is first heard in response to the application.

In *Ramsey v. Erie R. Co.* 38 How. Pr. 193, it was held under the facts of the case that the plaintiff had no such standing in court as a creditor, bondholder, or stockholder as to entitle him to a receiver and that the law is well settled that a receiver of a railway company cannot be properly appointed in an action by a stockholder or a creditor who has no judgment.

In *Smith v. Port Dover & L. H. R. Co.* 12 U. C. App. 288, it is held that in the appointment of a receiver the court acts only upon the proper case being made for the exercise of its jurisdiction according to well-established principles, and in that sense only can a receiver be said to be *ex debito justitiæ*, whether the application be interlocutory or made at the hearing, whether the appointment of a receiver is the sole object of the action or only incidental to other relief and whether the relief is sought at the instance of a judgment creditor or of anyone else.

¹A receiver will not be appointed where it appears that it would be more conducive to the interest of all other stockholders not to disturb the exist-

ing management and arrangements in the company, and where the relief asked for would produce irreparable injury to the majority of the stockholders. *Hamilton v. Accessory Transit Co.* 26 Barb. 46.

In *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 805, under the statutes of Connecticut providing for receivers, it was held that it was a part of the contract with the policy holders that in case of insolvency a receiver should marshal all the assets so that his powers would not be limited as those of a receiver usually are; that when such receiver has been duly appointed in the mode provided for in the charter policy holders cannot deny his authority; that the distribution of the assets of the company should be made according to the charter; that the facts set forth in the bill of complaint did not show complainant had a superior right to the assets of the company in the state of Iowa, but on the contrary such assets were part of the common fund in which all policy holders had an interest.

In *Pyles v. Riverside Furniture Co.* 30 W. Va. 123, it was held that the facts alleged in the bill did not justify the taking of the property of the corporation out of the hands of trustees and putting it in the hands of a receiver.

In *Voss v. Reed*, 1 Woods, 647, it was held that where funds are in the hands of trustees appointed by the legislature to hold their trust *ex officio* as high public officers of the state and especially where one part of the trust involves duty of a public character the court will not willingly take the funds out of their hands and will not do so except for the most cogent rea-

(h) When the rights of third parties who are not before the court are affected by the appointment.¹

(i) When it is apparent that the plaintiff's application is based solely upon a disagreement as to the management of the business of the corporation.²

§ 274. Powers of railway receiver.

The receiver of a railroad company, as a rule, *ex necessitate* has powers far in excess of those ordinarily given to receivers of other corporations, and his duties are correspondingly increased. Generally speaking, the magnitude of the interests intrusted to his management carries with it greater power and discretion, and, from the very nature of the business, a judicious management depends largely upon the exercise of a sound business judgment in the many conflicting and embarrassing positions in which the receiver is placed, sometimes requiring prompt action, where application to court for specific directions is not practicable. As in other cases, the receiver's power is derived from the order of

sons, such as gross fraud and imminent danger to the trust fund, it must resort to every course and means of compelling the trustees to perform their duty.

¹ *Whelpley v. Erie R. Co.* 6 Blatchf. 271; *Bigelow v. Union Freight R. Co.* 137 Mass. 478.

In *Searles v. Jacksonville, P. & M. R. Co.* 2 Woods, 621, the court refused to appoint a receiver of property which was in the possession of a person not a party to the suit.

² In *American Loan & T. Co. v. Toledo, C. & S. R. Co.* 29 Fed. Rep. 416, it is said the court will not appoint a receiver on account of the mere disagreement of the parties as to the management of the property; that can only be done as an incident to some relief falling within the jurisdiction of the court in relation to the contracts of the parties. The appointment of a

receiver merely to manage the property is not within the power of the court of equity.

In *Cleveland, C. O. & I. R. Co. v. Jewett*, 37 Ohio St. 649, the controversy between the parties was solely as to the effect of an attempted consolidation of corporations and under such circumstances the appointment of a receiver was held to be an unwarranted exercise of judicial power, which the court would reverse and set aside. See *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 15; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438.

In *Hinkley v. Blethen*, 78 Me. 221, there was a contest between the stockholders of the corporation and the court held there was no ground for the appointment of a receiver. See *Delaware, L. & W. R. Co. v. Erie R. Co.* 21 N. J. Eq. 298.

appointment, and such specific orders and directions as the court, from time to time, may make. The primary object in the appointment of a receiver over a railway is the sale of its property and conversion of its assets, and the distribution of the proceeds thereof among those entitled thereto, according to their several rights and interests, as fixed by the court.

In all cases it is the duty of the court, acting through its receiver, to preserve the property and carefully protect the interests of bondholders, creditors, lienholders, and all others therein, which can only be done by keeping the property intact. The receiver is required to manage and operate the road as a going concern, and this, of necessity, requires the investment of the receiver with all requisite power and authority therefor, as incidental and secondary to the main purpose of the litigation. Besides, the railway corporation, in consideration of its franchises and grants, assumed duties of a quasi-public nature, which the court will recognize as of primary importance and, through its receiver, will perform, and, in order to properly do so, will clothe the receiver with additional powers not ordinarily granted to other receivers, in the way of affording facilities for the adequate and proper management of the road and the safety and convenience of the public.

As elsewhere noted, the appointment of a receiver cannot have any effect as to the validity of existing liens, or in a word he takes the property subject to all valid existing liens.¹

§ 275. Power to pay unsecured claims.

The power of the court to order the receiver to pay from the current earnings of the road the unsecured claims for labor, sup-

¹ The court appointing a receiver of a railroad company, in a suit by stock and bond holders and general creditors for the appointment of receivers to preserve the property and manage it as a unit, has no power to vacate any valid lien upon the property, and prevent the enforcement of a judgment constituting a valid lien thereon, but should either order payment thereof or grant leave to sue out execution and sell the property upon which it is

a lien. *Scott v. Farmers' Loan & T. Co.* 69 Fed. Rep. 17.

The holder of a judgment constituting a lien on real estate of a railroad not embraced in mortgages under which a receiver was appointed is entitled to have such land discharged from the custody of the receiver, and to levy, for the sale of the same, an execution to satisfy the judgment. *Scott v. Farmers' Loan & T. Co. supra.*

plies, and equipment existing at the time of the appointment, has been a subject of much discussion, but is now firmly established in railway foreclosure cases. There is not entire harmony in the courts, it is true, as to the nature of the claims allowed priority under this rule, nor as to the time within which the claims must have accrued in order to receive the sanction of the court in their payment. The New York courts, prior to the passage of the statute of 1885 (see chap. 376), refused to permit receivers to pay or to issue receiver's certificates for the payment of indebtedness for labor and services rendered to the corporation prior to the receiver's appointment, where the lienholders objected.¹ The Federal courts, however, have shown great liberality in authorizing the receiver to pay this class of indebtedness from the current receipts, and, if insufficient, then from the *corpus* of the property. It is impossible to determine from the adjudicated cases any rules of universal application, and the chancellor, in the absence of statutory regulations, and in the exercise of a sound judicial discretion, must determine from each particular case the justice and equity of granting the receiver power to pay from the current receipts the indebtedness of the corporation accruing prior to the appointment, on account of labor and supplies in operating the road, or borrow money upon receiver's certificates for such purpose. In favor of the exercise of this power by the court, the following principles have been recognized and have received the sanction of the courts:

(a) While courts of equity have no power to impair the validity of existing mortgage liens by the creation of liens in favor of a class of unsecured creditors and give them a priority over the former, yet the mortgagee at the time of taking his mortgage fully understood he was procuring a lien upon a live and going concern, and that it was to be continued as such, and in order to do so the operating expenses, including supplies and labor, must be paid from the current receipts, and when he asks the aid of

¹ The act of 1885, chap. 376, required an insolvent railroad corporation to pay the wages of its employees in preference to its other debts. Prior to the passage of this act the court had no power to authorize a receiver to issue certificates of indebtedness

for the payment of labor and services in operating the road prior to the receiver's appointment and make the certificates a lien prior to the mortgage. *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.* 103 N. Y. 245. Cf. *Rahit v. Attrill*, 106 N. Y. 423.

the court in realizing upon his securities he is not in a position to insist upon a different understanding. Besides, but for the labor and supplies already furnished and not paid for, the value of his security is maintained. He asks the court, as a means of preventing a depreciation in the value of the security, to continue the business as a going concern, and shall he repudiate that which has been done of equal value for the same end?

(b) There must of necessity be a limit as to the time in which the indebtedness accrued, which in all cases must be reasonable, sometimes being fixed at three months, and sometimes six months or even longer. It is also quite as necessary to determine what classes of claims are entitled to protection. Usually, however, they are confined to labor and supplies strictly necessary for the operation of the road, though sometimes permanent improvements under peculiarly equitable circumstances are embraced.¹

¹ In *Wallace v. Loomis*, 97 U. S. 146, 162, 24 L. ed. 895, 901, the receivers were authorized by the order appointing them to put the road in repair and operate the same and to procure such rolling stock as might be necessary; and for these purposes to raise money by loan to an amount named in the order, and issue their certificates of indebtedness therefor, and the order declared that such loan should be a first lien on the property, payable before the first mortgage bonds. The court say the power to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for the repayment, cannot at this day be seriously questioned. It is a part of that jurisdiction always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is undoubtedly a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund. In *Humphreys v. Allen*, 101 Ill. 490,

it is held that any person desiring to object to the issuance of such certificates must do so before they are issued and sold to bona fide purchasers or paid out to creditors.

In *Philadelphia Invest. Co. v. Ohio & N. W. R. Co.* 86 Fed. Rep. 48, where it was doubtful if the improvements would add to the selling price of the road, it was held that the issuing of receiver's certificates should be denied absolutely for an item for purchasing and laying track over a portion of the road not yet completed; also for another item to reimburse bondholders for advances made to meet arrears of wages and divert a strike; that another item for the payment of claims for material furnished should not be allowed except upon the consent of all lienholders, and that certain other items, if desired by the consenting bondholders, should be allowed and made a charge as against the non-consenting bondholders.

In *Humphreys v. Allen*, 101 Ill. 490, it is held that if the holder of railroad bonds secured by trust deeds has notice of the appointment of a receiver

In order to make payments of this nature, where the receiver has not adequate funds in his hands for such purpose, the court in foreclosure proceedings frequently orders the issuance of receiver's certificates, payable out of the current net income, or, in case of its inadequacy, out of the proceeds of sale, prior to the payment of the mortgage bondholders.

and the entry of an order directing such receiver to issue certificates on which to raise money to discharge a chattel mortgage on personal property of the company, pay taxes and current expenses, and making such certificates a prior and first lien on all the property of the company, and he desires to question the power of the court to make such an order, it must be done before the certificates are issued and sold to bona fide purchasers or paid out to creditors of the company.

In *Meyer v. Johnston*, 53 Ala. 287, it is held that a court of chancery has power, after notice of a hearing of interested parties, to authorize the issue of certificates creating a first lien and displacing their lien to that extent on the property of a railroad which it is operating through its receivers whenever it is necessary to raise money for the economical management and conservation of the property.

In *Hoover v. Montclair & G. L. R. Co.* 29 N. J. Eq. 4, it was held that where a receiver had no funds with which to make repairs he would be authorized to issue receiver's certificates therefor, such certificates being for a debt incurred for the benefit and protection of the property, and a first lien upon the property of the road and the net receipts and income thereof.

In *Kennedy v. St. Paul & P. R. Co.* 2 Dill. 448, it was held that in order to prevent a valuable land grant in favor of a railroad company from

lapsing, a receiver might be appointed at the instance of bondholders, where the principal security was the land granted, and the receiver was authorized to complete the unfinished portion of the road and his debentures issued for that purpose were made a first lien.

In *Taylor v. Philadelphia & R. R. Co.* 7 Fed. Rep. 877, where the mortgage bondholders obtain appointment of receivers in a foreclosure proceeding, the court in its discretion was empowered to pay employees and materialmen, who had, prior to the appointment, furnished labor and material and supplies necessary for the operation of the road. And the fund produced by the administration of the court may be distributed at the discretion of the court in such manner as not to embarrass the receivers, and pay for labor and materials by certificates payable out of any funds applicable thereto, at such dates as the receiver may designate.

In *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* 50 Fed. Rep. 481, the court refused to authorize a receiver to issue certificates and make a first lien on mortgaged property in order to continue the business in the case of a mining company. See note on this case in 16 L. R. A. 608.

In *Metropolitan Trust Co. v. Tonawanda & S. C. R. Co.* 108 N. Y. 245, it is held that prior to the passage of the Act of 1885 the court had no power to authorize a receiver in a foreclosure proceeding to pay or issue his certifi-

§ 276. Grounds upon which preferred claims allowed.

The grounds upon which unsecured claims have been allowed preferential payment from the current income derived from the operation of the road prior to the lien indebtedness may be stated as follows:

(a) The necessity of the payment of such claims in order to keep the road in operation as a going concern, and thus preserving the property from depreciation and ruin, thereby protecting the lienholders.¹

(b) Where the mortgagee applies to the court for a foreclosure of his mortgage or trust deed, and asks the court through its receiver to take from the legally constituted authorities the operation and management of the road pending such foreclosure, the court, as an equitable condition to the appointment of a receiver, may require the payment of operating expenses incurred prior to the appointment, at least for a reasonable period.²

cates in payment of labor and services in operating the road prior to his appointment, and make such certificates a prior lien to the mortgage.

¹ *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 29 L. ed. 963; *Central Trust Co. v. St. Louis, A. & T. R. Co.* 41 Fed. Rep. 551; *Miltenerberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672.

² *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. Rep. 182. In *Fosdick v. Schall*, 99 U. S. 235, 253, 25 L. ed. 339, 343, Chief Justice Waite said: "The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers, and grant him purely equitable relief, he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right, such an ap-

plication always calls for the exercise of judicial discretion, and the chancellor should so mould his order that, while favoring one, injustice is not done to another." To the same effect, substantially, are the following cases: *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488; *Miltenerberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 311, 27 L. ed. 117, 127; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 457, 29 L. ed. 963, 971; *Thomas v. Peoria & R. I. R. Co.* 36 Fed. Rep. 808; *Central Trust Co. v. St. Louis, A. & T. R. Co.* 41 Fed. Rep. 551; *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 260; *Central Trust Co. v. Texas & St. L. R. Co.* 22 Fed. Rep. 135; *Douglass v. Cline*, 12 Bush, 608; *Williamson v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 624; *Poland v. Lamoille Valley R. Co.* 52 Vt. 144; *Hervey v. Illinois M. R. Co.* 28 Fed. Rep. 169; *United States Trust Co. v. New York, W. S. & B. R. Co.* 25 Fed. Rep. 797; *Mercantile Trust Co. v. Pittsburgh & W. R. Co.* 29 Fed. Rep. 730; *Atkins v. Petersburg R. Co.* 8 Hughes,

(c) Where the current receipts have been diverted from the payment of the operating expenses and applied in payment of the bonded indebtedness or such permanent improvements as result in the enhanced value of the property constituting the security of the bondholders, the court upon equitable grounds may restore to the labor and supply creditors from the current net receipts, or the corpus, the money thus diverted. This principle is based upon the tacit understanding of the lienholders that the income, so far as necessary, shall be applied in payment of the ordinary current operating expenses due for labor and supplies.¹

307; *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. 290; *Addison v. Lewis*, 75 Va. 701; *Oss v. New Jersey M. R. Co.* 81 N. J. Eq. 105; *Porter v. Pittsburgh Bessemer Steel Co.* 120 U. S. 649, 80 L. ed. 830; *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 42 Fed. Rep. 6; *Jessup v. Atlantic & G. R. Co.* 8 Woods, 441; *Blair v. St. Louis, H. & K. R. Co.* 22 Fed. Rep. 471; *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. ed. 825; *Morgan's Louisiana & T. R. & S. S. Co. v. Texas C. R. Co.* 187 U. S. 171, 84 L. ed. 625; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 62.

The requirement imposed as a condition of the appointment of receivers of a railroad corporation, that a judgment against the company be paid out of the proceeds of the property, is conclusive where all the parties acquiesce and accept it, whether or not the court had the power to impose it in the first instance. *Union Trust Co. v. Atchison, T. & S. F. R. Co.* (N. M.) 42 Pac. 89.

The time within which the claim must have accrued in order to be entitled to a preferential payment has been arbitrarily fixed at various periods, sometimes ninety days, sometimes six months, twenty-two months, and even three years. See as to sev-

eral periods. *Blair v. St. Louis, H. & K. R. Co.* 22 Fed. Rep. 478, note; *Hale v. Frost*, 99 U. S. 389, 25 L. ed. 419; *Douglass v. Cline*, 12 Bush, 608; *Skiddy v. Atlantic, M. & O. R. Co.* 8 Hughes, 320; *Williamson v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 624; *Atkins v. Petersburg R. Co.* 8 Hughes, 307. It is not essential that the order for the payment of the preferred debts should be made at the time of the appointment, though it is the better practice to do so. *Central Trust Co. v. St. Louis, A. & T. R. Co.* 41 Fed. Rep. 551; *Foedick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Blair v. St. Louis, H. & K. R. Co.* 22 Fed. Rep. 471. Nor is the payment of this class of claims as preferential dependent upon the appointment of a receiver. They have priority over the mortgage without regard to the question of receivership. *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. Rep. 182.

¹In *Williamson v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 624, it was held that if a railroad company before the appointment of a receiver had paid out of the net revenues interest on the bonded indebtedness, or, for the purpose of repair and improvement of the road upon the sale of the road, there should be paid to the creditors for labor and material from the

proceeds of the sale, the amount of net revenues so diverted. This decision is based on *Douglass v. Cline*, 12 Bush, 608; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1, with other cases.

In *McIlhenny v. Bins*, 80 Tex. 1, it appeared that the net earnings of the road sufficient to pay all the labor and supply claims had been appropriated towards betterments upon the roads, and the interest upon the bonds, and it was held that such diversion was in derogation of the rights of those entitled to the fund, and that it was proper that the money should be restored or provided for in the order of the sale of the road.

In *Blair v. St. Louis, H. & K. R. Co.* 22 Fed. Rep. 471, it is held that claims for labor and supplies accruing within six months prior to the appointment of a receiver are entitled to be paid out of the net income of the receivership, and in exceptional cases where special equity appears such claims may be made a first lien upon the corpus of the mortgaged property.

In *Turner v. Indianapolis, B. & W. R. Co.* 8 Biss. 315, a receiver was ordered to pay the claims of operatives and supply men owing at the time of his appointment and to hold the property subject to them, not as a lien upon the road but in the exercise of the equitable discretion of the court. In fixing the time within which such claims will be allowed and ordered paid, the court adopted by analogy the rule of the statute of Illinois in relation to liens on railroads for work done and material furnished.

In *Thomas v. Peoria & R. I. R. Co.* 36 Fed. Rep. 808, Mr. Justice Harlan held that if, both before and during the receivership of the property of a railroad corporation pending a mortgage foreclosure, moneys from the current receipts are expended for materials and equipment, a claim for rent of

cars may be charged upon the income during the receivership, and if that is inadequate, upon the proceeds of the mortgaged property; but that in the absence of special circumstances such preferential payment would not be extended back of six months before the receivership.

In *Pennsylvania Finance Co. v. Charleston, C. & O. R. Co.* 48 Fed. Rep. 188, it is held that persons who furnish labor supplies and material to a railroad to keep it a going concern are entitled to payment out of the earnings thereof before the payment of any interest on the mortgaged bonds, and if it appears that money due upon claims of this nature has been paid out as interest on the bonds or for permanent improvements whereby the bondholders have been benefited, the court will order an amount equal to the sum so diverted to be paid upon such claims out of any earnings in the hands of a receiver, or failing in this, out of the proceeds of sale.

In *Pennsylvania Finance Co. v. Charleston, C. & O. R. Co.*, *Ex parte* Moore, 49 Fed. Rep. 693, preferential payment, it was held, would not be given to a merchant for rations furnished to laborers upon the railway under contract with the company and for which the company alone is liable, although the company charges the rations to its laborers as part of their wages.

In *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. Rep. 182, claims for which a preferential payment will be made are said to be in favor of those who have aided to conserve the property, and have been contracted within a reasonable time, and that the six months' rule is not a fixed and unbending rule barring all claims contracted more than six months before the appointment, nor

(d) Where the statute creates a lien in favor of specific creditors having priority over the mortgage bondholders.¹

is the authority to prefer claims confined to cases where there has been a diversion of the income.

In *Fosdick v. Schall*, 99 U. S. 252, 25 L. ed. 842, Chief Justice Waite says that every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not be improperly called the current debt fund and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition to such order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do, and even though the mortgage may in terms give a lien upon the profits and income until possession of the mortgaged premises is actually taken, or something equivalent, the whole earnings belong to the company and are subject to its control. See *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459, 20 L. ed. 199; *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 608, 23 L. ed. 405; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. ed. 144.

In *Mittenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, the receiver was authorized to

pay arrears due for operating expenses not exceeding \$10,000 to other connecting lines for materials and repairs and for ticket and freight balances, part of which had been incurred more than 90 days before the order appointing the receiver was made, and to purchase rolling stock and build 6 miles of road and a bridge on the main line of the road, and make such expenditures a lien prior to the lien of the mortgagees. See also *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596. In this case income was diverted to the improvement of the property, and an assignee of such a claim is entitled to the same rights as the original holder.

In *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 484, 29 L. ed. 963, certificates issued for necessary repairs were allowed priority, and it is held that the rule is applicable to a case in which the first receiver was appointed in a suit not brought by the bondholders or the trustees; that it was sufficient if the bondholders and their trustee, after they were made parties, knew of the merits of the order and the application of the money upon which the certificates were issued, to replace earnings diverted from the payment of operating expenses and ordinary repairs. See also *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694; *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163.

¹ In nearly all the states and territories liens have been given by statute for labor, and usually for labor and materials furnished for the construction and operation of railroads, as follows:

Alabama,	for labor	Code 1876, § 3481.
Arizona,	and materials.	Rev. Stat. 1887, § 2294.
Arkansas,	" "	Act 1887, p. 96.
California,	" "	Stat. 1883, §§ 2181, 2189, 2148.
Colorado,	" "	
Connecticut,	" "	Gen. Stat. 1888, § 3023.
Florida,	" "	
Georgia,	" "	Code, 1882.
Idaho,	" "	Gen. Laws, 1880, 1881, Code Civ. Proc. §§ 815, 829.
Illinois,	" "	Stat. of 1895, 1872, 1877.
Indiana,	" "	Laws 1887, chap. 9, p. 27; Rev. Stat. 1881, §§ 5286, 5291.
Iowa,	" "	Rev. Code, 1880, § 2132.
Kansas,	" "	Comp. Laws 1885, chap. 84.
Kentucky,	" "	Gen. Stat. 1881, p. 982.
Maine,	" "	Rev. Stat. 1883, chap. 51.
Massachusetts,	" "	Act 1873, chap. 353; Act 1882, chap. 112.
Michigan,	" "	Stat. 1882, §§ 3423, 3425.
Minnesota,	" "	Gen. Stat. 1878, chap. 10, § 1.
Mississippi,	" "	Laws 1882, chap. 88.
Missouri,	" "	Rev. Stat. 1879, §§ 3200, 3216.
Montana,	" "	Comp. Stat. 1887, §§ 1870, 1894.
Nebraska,	" "	Comp. Stat. 1885, p. 426.
Nevada,	" "	Gen. Stat. 1885, §§ 3908, 3927.
New Jersey,	" "	Rev. Stat. 1877, p. 927.
New Mexico,	" "	Comp. Laws 1884, §§ 1519, 1535.
New York,	" "	3 Rev. Stat. 7th ed. 1882, p. 2439.
North Carolina,	" "	Act 1871, 1872, chap. 138; Code 1882, § 1942.
North Dakota,	" "	Rev. Code, § 4790.
Ohio,	" "	Laws 1884, p. 126; Laws 1883, p. 99.
Pennsylvania,	" "	Purdon's Bright. Dig. 1883, p. 118.
Rhode Island,	" "	Pub. Stat. chap. 177, §§ 1-28.
South Dakota,	" "	
Tennessee,	" "	Code 1882, §§ 2774, 2775, 2778.
Texas,	" "	Laws 1879, p. 8, chap. 12, § 1, 4; Laws 1887, chap. 25.
Utah,	" "	Laws 1884, p. 340, §§ 1057-1070; Code 1880.
Vermont,	" "	Rev. Laws 1880, § 3872.
Virginia,	" "	Code 1887, §§ 2485, 2486.
Washington,	" "	Code 1893, § 1229.
West Virginia,	" "	Code 1887, chap. 75.
Wisconsin,	" "	Rev. Stat. 1878, §§ 3314, 3318; Supp. 1883.
Wyoming,	" "	Rev. Stat. 1887, §§ 1507, 1512, 1517, 1540.

It should be observed in this connection that where the statute has given a

(e) The classes of claims for which preferential payments have been allowed in priority over the mortgage indebtedness are generally confined to (1) the operating expenses, such as for labor, supplies, rolling stock, and rentals.¹ (2) There is a class of cases,

lien to a class or classes of persons, the lien cannot be extended to others not clearly within the class or classes specified. If the term "laborer" is used it does not include others who furnish labor. *Lehigh Coal & Nav. Co. v. Central R. Co.* 29 N. J. Eq. 252; *Pennsylvania & D. R. Co. v. Leuffer*, 88 Pa. 168; *Erickson v. Brown*, 88 Barb. 390; *Poland v. Lamoille Valley R. Co.* 52 Vt. 144. In other words, the statutes will not be extended beyond the clear purport thereof by implication.

¹ In *Turner v. Indianapolis, B. & W. R. Co.* 8 Biss. 815, the court say: "The practice has been to allow all to be paid that could be fairly regarded as a part of the actual operating expenses of the road, whether for labor or supplies in their various forms."

In *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, Mr. Justice Brewer says: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in pref-

erence to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when the court appoints a receiver of railroad property it has no right to make that receivership conditional on the payment of other than those few unsecured claims which by the rulings of this court have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens." *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 832. It should be observed that the foregoing remarks of Mr. Justice Brewer were in a case brought by a creditor and not in a case where the mortgagee was seeking to foreclose his mortgage.

however, growing out of the construction of the road, which are entitled to payment in priority to the bondholders, that are not included in the general class of operating expenses above. Thus, where the mortgage is executed prior to the construction of the road, or at least prior to its completion, and it is apparent that the lien of the mortgage is designed to attach to the road when completed, and claims for construction account have accrued growing out of labor and supplies furnished after the execution of the mortgage and in the completion of the road, and the net income has been diverted to the payment of interest or improvements, the claimants in such case are entitled to priority over the secured bondholders.¹

§ 277. Scope of implied power as to operating expenses.

(a) In regard to the receiver's right to pay indebtedness accruing out of his management of the road pending the receivership less difficulty has been experienced, and it may now be stated as a general principle well established that all expenditures made by him in the ordinary course of business and in good faith, with a view to a careful and judicious management and operation of the road, are to be considered within the discretion allowed to a receiver of a railroad. In the absence of general direction and power given to the receiver, in this regard, in the order of appointment, the nature and scope of his duties would necessarily imply such power, for the law never imposes a duty without, at the same time, giving the necessary power to perform such duty, and especially is this true in regard to receiverships of railways where the power is a necessary attribute to the duties imposed. The scope of the outlays which a railway receiver may be considered as authorized to make may be considered as including the cost of all necessary labor and supplies adequate to the due and proper management of the road, as a going concern keeping in mind the preservation of the property, and the safety and convenience of the public; all necessary repairs to the same end; all liabilities incurred in sustaining the necessary business relations with other railroads and carriers; and all obligations incurred by reason of his relations to the public and duties as a common carrier.²

¹ *McIlhenny v. Binz*, 80 Tex. 1.

Trust Co. v. Illinois M. R. Co. 117 U.

² Mr. Justice Blatchford in *Union*

S. 434, 455, 29 L. ed. 963, 970, says:

"Property subject to liens and claims and debts of various characters and ranks which is brought within the cognizance of a court of equity for administration and conversion into money and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but if perishable it must be sold by way of preservation. A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate, decay, and perish if not cared for and kept up but its business and goodwill will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for private gain to the corporators but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations must necessarily be held to do so in the view that if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands to have the purposes of its creation still carried out, the court while in charge of the property has the power, and under some circumstances it may be its duty to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent nor on prior notice. Consent is de-

sirable, but is seldom practicable, where the debts exceed the value of the property." Cf. *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 1008; *Mittenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672.

Arrears due for operating expenses, ticket and freight balances, money due for rolling stock, labor, car springs, salary of the attorney immediately prior to the appointment, and taxes, are among the claims that have been treated as preferred. *Litzenberger v. Jarvis-Conklin Trust Co.* 8 Utah, 15; *Mittenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Atkins v. Petersburg R. Co.* 3 Hughes, 307; *Skiddy v. Atlantic, M. & O. R. Co.* 3 Hughes, 320; *Blair v. St. Louis, H. & K. R. Co.* 23 Fed. Rep. 521; *Giles v. Stanton*, 86 Tex. 620; *Re Eastern & M. R. Co.* L. R. 45 Ch. Div. 387.

This class of preferential claims are in their nature equitable claims and are subject to assignment. *Burnham v. Bowen*, 111 U. S. 776 28 L. ed. 596; *Union Trust Co. v. Walker*, 107 U. S. 596, 27 L. ed. 490; *McIlhenny v. Bins*, 80 Tex. 1.

The right of preference in payment out of funds in the hands of receivers attaches to the debt, and not to the person of the original creditor, and will pass to an assignee of the debt. *Northern P. R. Co. v. Lamont*, 69 Fed. Rep. 23.

The receiver has power to make such reasonable outlays as are required in the ordinary course for such as keeping the road and its rolling stock in repair, etc. *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606.

In *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 29 L. ed. 963, priority was allowed over the mortgage indebtedness for necessary repairs,

(b) It should be observed, however, that the doctrine above announced, authorizing the receiver to create indebtedness entitled to priority over the bonded indebtedness, is not to be applied, as a rule, to private corporations, which are not quasi public in their nature.¹

tax liens, receivers' certificates issued, or surplus earnings diverted from the payment of operating expenses, worn-out parts of the road, wages for the employees of the receiver, debts due to other railroad companies, ordinary expenses of the receivers in operating the road, and rents of rolling stock, and if the earnings were not sufficient they were to be paid out of the corpus of the property; but it was held that debts for money borrowed by the receiver without the previous order of the court were not to be allowed priority, though the money was applied to pay expenses of the receivership, repairs, and supplies.

In *Cowdrey v. Galveston, H. & H. R. Co.* 1 Woods, 331, all outlays of the receiver intrusted with the management of a railroad which were made in good faith, in the ordinary course of business, with a view of advancing the business of the road and to make it profitable and successful, were held to be within the line of the discretion necessarily allowed to the receiver, but where extraordinary outlays of money are to be made the receiver in all cases should apply to the court for authority. In this case receivers' expenses for counsel and witness fees incurred in a motion for his removal were allowed as a charge against the trust fund when it appeared that he acted in good faith and with integrity of purpose and when it further appeared that there were no grounds nor apparent grounds for the motion.

¹In *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* 50 Fed. Rep.

481, 16 L. R. A. 603, Judge Gresham says: "Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. It is only against railroad mortgages that the Supreme Court of the United States has sustained orders giving priority to receiver's certificates representing particular indebtedness, and, as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public." In *Wood v. Guarantee Trust & Safe Deposit Co.* 128 U. S. 417, 32 L. ed. 472, the court say: "The doctrine of *Fosdick v. Schall*, 99 U. S. 252, 25 L. ed. 842, has never yet been applied in any case except that of a railroad." And see *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 34 L. ed 379; *Bound v. South Carolina R. Co.* 50 Fed. Rep. 312; *Manchester Locomotive Works v. Truesdale*, 44 Minn. 118, 9 L. R. A. 140; *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 43 Fed. Rep. 372; *Seventh Nat. Bank v. Shenandoah Iron Co.* 35 Fed. Rep. 436; *Raht v. Attrill*, 42 Hun, 414. But see *Karn v. Rorer Iron Co.* 86 Va. 754. In this case it does not seem that the question as to the right in the matter of a private corporation was raised against the right of the receiver to issue certificates having priority over existing mortgages in payment of claims accruing prior to receiver's appointment generally. See *Manchester Locomotive Works v. Truesdale* (Minn.) 9 L. R. A. 140, note p. 143, where the following cases are

§ 278. Preferential claims, basis of.

(a) In receiverships of railways there has grown up a practice in courts of equity of allowing a species of claims a preferential attitude towards contract lienholders, and thus giving such claims a priority in payment over the bonded indebtedness secured by mortgage or trust deed. These are sometimes called by the courts equitable liens and, whatever may be said as to the justice and equity of giving them priority over the recorded contractual liens, it is doubtful whether the court has power to base the priority of their payment upon the existence of an actual lien. The equitable priority in the allowance of these claims is to be found rather in the contractual relation of the parties. Thus when a mortgagee takes mortgage security upon a railway and its income, it is done with the tacit understanding that the mortgagor shall operate the road as a going concern, and that his lien attaches to the corpus and its earnings only when the operating expenses have been paid. The giving of this class of claims a priority in payment over the mortgage indebtedness has for its basis the non-existence of a mortgage lien rather than a lien of the claimants, in so far as the necessary operating expenses are concerned. If it be true that from any state of facts or relationship of parties a court of equity can create a lien, and make it superior to that of a recorded mortgage, it is a power beyond that usually supposed to belong to such courts.

(b) Sometimes this class of claims is given an equitable priority in mortgage foreclosures upon the ground that the court, in the exercise of a sound judicial discretion, may impose terms upon the plaintiff and require him, as a condition of granting a receivership, to consent to the payment from the income of the operating

cited: *Dunham v. Cincinnati, C. & C. R. Co.* 68 U. S. 1 Wall. 254, 17 L. ed. 584; *Denniston v. Chicago, A. & St. L. R. Co.* 4 Biss. 414; *Duncan v. Mobile & O. R. Co.* 2 Woods, 542; *Jerome v. McCarter*, 94 U. S. 784, 24 L. ed. 186; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Brown v. New York & E. R. Co.* 19 How. Pr. 84; *Vatable v. New York, L. E. & W. R. Co.* 96 N. Y. 49; *Atkins v. Petersburg R. Co.* 3 Hughes, 807; *Union Trust Co. v. Souther*, 107 U. S. 592, 27 L. ed. 488; *Farmers' & M. Nat. Bank v. Philadelphia & R. R. Co.* 7 Fed. Rep. 379; *Meyer v. Johnston*, 58 Ala. 237; *Coe v. New Jersey M. R. Co.* 81 N. J. Eq. 105; *Turner v. Peoria & S. R. Co.* 95 Ill. 185; *Coe v. Columbus, P. & I. R. Co.* 10 Ohio St. 372; *Gurney v. Atlantic & G. W. R. Co.* 68 N. Y. 358; *United States Trust Co. v. New York, W. S. & B. R. Co.* 25 Fed. Rep. 803.

indebtedness accruing within a limited period prior to the receivership, and thereafter, on the ground that before he is in a condition to ask for equity he must do equity. In other words the court, in effect, says to the plaintiff "the equitable rights asked for will be granted only on condition that you consent that the receiver pay certain specified indebtedness" which, in the view of the court, is entitled to peculiar equitable considerations. This doctrine, as a basis of judicial action, it would seem ought not to be extended, and particularly so where, as in this class of cases, its application is wholly unnecessary.

§ 279. Rule in Federal courts.

The Supreme Court of the United States in a case where it appeared that rolling stock was purchased under the form of leases in which the title was reserved in the vendors until certain annual amounts were paid, with a provision that the vendors might retake the property on default in the payments, and the bill was filed by a judgment creditor, and subsequently, after the expiration of four months', bills were filed by the trustees for the foreclosure of the mortgages, and a receiver was continued thereunder, where it appeared that the receipts were not sufficient to pay the operating expenses, and that the rolling stock was returned to the intervenors prior to the sale, but no demand was made prior to the filing of the bills for foreclosure for the return, and it was sought to recover from the receiver the contract price or rental for the rolling stock during the four months prior to the filing of bills for foreclosure, the following propositions were considered and established by the court:

(a) The court by the appointment of a receiver acquires certain rights, and assumes certain obligations, and the expenses which the court creates in discharge of these obligations are burdens necessarily on the property taken possession of, and this irrespective of the question who may be the ultimate owner or who may have the preferred lien or who may invoke the receivership.

(b) The court has no right to make the receivership conditional on the payment of other than those few unsecured claims which by the rulings of that court have been declared to have an equitable priority.

(c) No one is bound to sell to a railroad company or to work

for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens.

(d) When the receiver is appointed at the instance of a general creditor and there is a deficit in the running expenses of the road, and rolling stock is taken back by the lessor under the provisions of his lease, his claim for rent is not entitled to priority over the mortgage creditors.

(e) If, however, the rolling stock is taken possession of by the receiver at the instance of the mortgagee, and is used for the benefit of the mortgagee's interest in the real estate, the rent for the rolling stock has priority to the mortgage, as to the earnings and proceeds of sale.

And in such case the reasonable rental value is the rental to be paid.¹

(f) (1) Where the interests of mortgagees are involved the growing tendency of courts is not to enlarge the class of claims which are given preference in payment over the mortgage indebtedness.² (2) The better rule would seem to be that the payment of claims as preferential to the mortgage lien does not depend upon a provision therefor incorporated in the order of appointment,³ though it has been held to be a prerequisite.⁴ (3) The general rule is that claims for which a preference is allowed must have accrued within a reasonable time prior to the appointment of the receiver,⁵ and while some courts have fixed an arbitrary

¹ *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379.

² The tendency of judicial decision is to narrow rather than enlarge the class of claims against railroad companies to be preferred over mortgage liens out of funds in the hands of receivers. *Wood v. New York & N. E. R. Co.* 70 Fed. Rep. 741.

³ The allowance of claims against railroads in preference to mortgage liens does not depend upon the order of court appointing receivers. *Wood v. New York & N. E. R. Co. supra.*

⁴ To make a claim for the services

rendered to a railroad company before the appointment of a receiver entitled to preference over mortgage indebtedness, there must have been an order of court at the time the receivers were appointed, for its payment, and the current earnings before or after the appointment of the receivers must have been diverted to paying interest on the mortgage debt. *Central Trust Co. v. Chattanooga S. R. Co.* 69 Fed. Rep. 295.

⁵ The allowance of claims in preference to mortgage liens against railroad property in the hands of receiver-

period of four, six, or twelve months within which claims are preferred,' yet no fixed and inflexible rule can be laid down upon the subject.² (4) The allowance of claims of this nature should not be granted without notice to those interested.³ (5) Claims for preference have been held to include labor,⁴

ers does not depend upon any fixed or arbitrary rule as to the time when the debts were contracted, further than that they must have been incurred within a reasonable time before the appointment of receivers, depending upon the circumstances of each particular case. *Wood v. New York & N. E. R. Co.* 70 Fed. Rep. 741.

A debt for coupling links and pins and tank steel furnished a railroad company within a reasonable time before the appointment of receivers is one for supplies necessary to keep it a going concern, possessing a superior equity over mortgage liens, when such supplies were necessary to the operation from day to day of the road. *Wood v. New York & N. E. R. Co. supra.*

¹ A claim for necessary supplies to keep a railroad a going concern, furnished within four months of the time of the appointment of receivers in a foreclosure suit in which the decree allows the receivers to pay supply accounts contracted within four months, and within a year of the appointment of the same receivers in another suit in which the decree declared that no payment should be made without special order of the court,—is not barred as not coming within the time within which priority can be given over the mortgage liens. *Wood v. New York & N. E. R. Co.* 70 Fed. Rep. 741.

The six months' limitation, in an order appointing receivers, upon the payment of claims for supplies, has no effect in barring meritorious pref-

erential claims. *Northern P. R. Co. v. Lamont*, 69 Fed. Rep. 23.

² There is no fixed rule of a Federal court barring claims contracted more than six months before the appointment of a receiver of a railroad company or giving claims contracted within such time a preferential character in respect to a mortgage upon the railroad property. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 69 Fed. Rep. 658; *Wood v. New York & N. E. R. Co.* 70 Fed. Rep. 741.

³ An order authorizing the receiver of a railroad company to issue his certificates to raise funds for the maintenance of the road cannot be granted without notice of the motion therefor to the parties interested in the fund sought to be charged thereby. *State v. Port Royal & A. R. Co.* (S. C.) 23 S. E. 380.

⁴ By the act of 1885 (N. Y. Stat. chap. 376), a receiver of a corporation is required to pay the wages of his employees and laborers in preference to other debts or claims, as therein specified. Prior to that act the court had no power to authorize a receiver in a foreclosure proceeding to pay or issue certificates for the payment of labor and services in operating a railroad accruing prior to his appointment and make such certificates a lien prior to the mortgage. *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.* 103 N. Y. 244.

In the case of *Raht v. Attrill*, 106 N. Y. 423, it is held that the lien of a mortgage attaches not only to the land in the condition in which it was

at the time of its execution, but as changed or improved by accretions or by labor expended upon it during the existence of the mortgage; and creditors whose debts were created for money, labor, or material used in the improvement acquire a legal or equitable claim to displace or subordinate the lien of the mortgage for their protection. The payment of this class of claims, where a bill is filed to foreclose a mortgage, is sometimes made a condition to the granting of an order for a receiver where the claims accrued within a short time prior to the receivership. *Fordick v. Schall*, 99 U. S. 235, 251, 25 L. ed. 339, 342; *Union Trust Co. v. Souther*, 107 U. S. 592, 27 L. ed. 448; *Burnham v. Bowen*, 111 U. S. 776, 783, 28 L. ed. 596, 599; *United States Trust Co. v. New York, W. S. & B. R. Co.* 25 Fed. Rep. 800, 802.

All debts incurred by a receiver for the necessary repairs and for the general protection and preservation of the property may be made and charged upon the corpus of the property itself. *Meyer v. Johnston*, 53 Ala. 837, 845, 850; *Wallace v. Loomis*, 97 U. S. 146, 163, 163, 24 L. ed. 895, 901; *Vermont & C. R. Co. v. Vermont C. R. Co.* 50 Vt. 500, 576; *Hoover v. Montclair & G. L. R. Co.* 29 N. J. Eq. 4; *Hale v. Nashua & L. R. Co.* 60 N. H. 833, 841; *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606, *et seq.*

The operating expenses of an insolvent railroad are preferred, as necessary for the preservation of the property. *Meyer v. Johnston*, 53 Ala. 237, 846; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 28; *Barton v. Barbour*, 104 U. S. 126, 134, 135, 26 L. ed. 672, 677, 678; *Poland v. Lamoille Valley R. Co.* 52 Vt. 178; *Woodruff v. Erie R. Co.* 98 N. Y. 609, 620, 622; *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606, 628; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 484, 464, 465, 29 L. ed. 963,

973, 974; *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.* 103 N. Y. 245.

The test is whether it has been shown that the debts or expenses for which priority is claimed were necessarily incurred for the protection or preservation of the property in the hands of the courts. *Hale v. Nashua & L. R. Co.* 60 N. H. 833; *Scott v. Delahunt*, 65 N. Y. 128; *Woodruff v. Erie R. Co.* 98 N. Y. 609, 622, 623; *Meyer v. Western Car Co.* 103 U. S. 13, 26 L. ed. 61; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 463, 464, 29 L. ed. 963, 973.

A telegraph company rendering services to a railroad company in operating a line along its road is a laborer within the Virginia statute giving laborers' claims priority over mortgages upon property in the hands of receivers. *Newgass v. Atlantic & D. R. Co.* 72 Fed. Rep. 712.

A bookkeeper of an insolvent corporation is an "employee" within N. Y. Laws 1885, chap. 876, § 1, providing that where the receiver of a corporation is appointed the wages of the employees shall be preferred to all other debts or claims against the corporation. *People v. Beveridge Brew. Co.* 91 Hun. 813.

Independently of the claim of division of income, debts may be preferred over mortgage liens upon railroad property in the hands of receivers when incurred for labor and supplies necessary to keep the road a going concern from day to day, or the outcome of indispensable business relations, the continuance of which involve the interests of the public and the traffic of the road. *Wood v. New York & N. E. R. Co.* 70 Fed. Rep. 741.

The inchoate right of one furnishing supplies and materials to an insolvent railroad company, to be preferred in

money expended, waiting rooms, ticket offices,¹ and operating expenses,² but does not include damages for personal injuries³

case a receiver is appointed, to the lien of a mortgage upon the property, is lost by the giving of a note by the railroad company guaranteed by the furnisher of the supplies and materials under a requirement that it be secured by a deposit of mortgage bonds of the railroad and a lien on all securities owned by the railroad in the possession of the bank discounting the note. *Ohio Falls Car Mfg. Co. v. Central Trust Co.* 71 Fed. Rep. 916.

¹ Moneys due for providing waiting-rooms, ticket offices, and a place for the employees of a railroad to board and lodge at reduced rates, at one of the principal stations of a railroad, constitute a preferential debt, where the road is in the hands of receivers. *Northern P. R. Co. v. Lamont*, 69 Fed. Rep. 23.

² Liability of sureties on a supersedeas bond obtained by a railroad company, fixed by default of the company after the appointment of a receiver, is entitled to rank as a current operating expense which should be paid out of the funds in the receiver's hands in preference to a mortgage debt. *Farmers' Loan & T. Co. v. Northern P. R. Co.* 71 Fed. Rep. 245.

Current expenses of a railroad in the hands of a receiver, whether contracted before or after his appointment, are properly paid out of the revenue coming into his hands, in preference to a mortgage. *Farmers' Loan & T. Co. v. Northern P. R. Co.* *supra*; *Wood v. New York & N. E. R. Co.* 70 Fed. Rep. 741; *Filkins v. Adams*, 60 Ill. App. 410.

Compensation and expenses allowed to the trustee in a railroad mortgage and its solicitor should not be given priority over receivers' certificates out

of the funds in the receiver's hands. *Petersburg Sav. & I. Co. v. Dellatorre*, 70 Fed. Rep. 643.

Money borrowed to pay taxes is a preferred claim. *Hanna v. State Trust Co.* 70 Fed. Rep. 2, 30 L. R. A. 201.

The filing of a bill for foreclosure of a mortgage covering the income of a railroad company does not impound its gross revenue so as to prevent the payment to connecting lines of road of their just and equitable share of the earnings from interchanged business. *Ames v. Union P. R. Co.* 73 Fed. Rep. 49.

The current income of a railroad is primarily to be devoted to the payment of current debts, and when used for the payment of interest upon mortgage indebtedness or for permanent improvements or for the benefit of the mortgagees in any manner, at the expense of the current debt fund, must be restored to the extent of such diversion. *Wood v. New York & N. E. R. Co.* 70 Fed. Rep. 741.

³ A judgment for personal injuries in favor of a passenger upon a railway operated by a receiver appointed in *quo warranto* proceedings instituted by the state to forfeit the company's charter for the purpose of having the railroad operated for the benefit of its owners, pending such proceeding, is not entitled to superior rank to the lien of a mortgage executed before the cause of action for damages accrued, notwithstanding a provision of the state court vacating such receivership, that the charges upon the property in the hands of a receiver are made a lien thereon. *Foreman v. Central Trust Co.* 30 U. S. App. 653, 71 Fed. Rep. 776.

nor rents.' (6) As to the justice and propriety of the allowance of these claims as preferential there can be no question, if the proper caution is exercised as to the scope of the allowance.'

§ 280. Application to rolling stock and car trusts.

Preferential payment has been extended to rentals under the conditional sales of rolling stock commonly designated as car trust leases. The payment or liability for such rentals, by the receiver, is governed by the same principles as obtain in the case of rentals for leased lines of road coming into the receiver's hands at the time of his appointment. He is entitled to a reasonable time in which to determine whether he will retain the rolling stock under the leases, or return the same to the lessors. If he retains the

Preference over a mortgage debt in respect to the receiver's earnings cannot be given to a claim for damages caused by negligence of a street railway company before the appointment of the receiver, in a suit to foreclose the mortgage on the street railway property. *St. Louis Trust Co. v. Riley*, 70 Fed. Rep. 32, 30 L. R. A. 456; *Farmers' Loan & T. Co. v. Detroit, B. O. & A. R. Co.* 71 Fed. Rep. 29.

A judgment creditor of a railroad for damages for personal injuries acquires no superior equity over a mortgage in funds paid by the company to its receiver from earnings prior to his appointment, where he has acquired no lien and obtained no injunction before the commencement of the suit to foreclose the mortgage, although payment of such sum to the receiver could not have been enforced against the objection of the mortgagor, as the right to make such objection is personal to the latter. *Farmers' Loan & T. Co. v. Detroit, B. O. & A. R. Co.* 71 Fed. Rep. 29.

The liability to a person injured by the operation of a railroad in the hands of receivers is a part of the running

expenses of the road, which will take precedence of mortgage liens upon the property in the receiver's hands. *St. Louis S. W. R. Co. v. Holbrook*, 73 Fed. Rep. 112.

'Rents accruing for property leased by a corporation from the appointment of a receiver of its property until confirmation of a sale of the leasehold do not constitute a prior charge upon the funds in the hands of the receiver, where he has not adopted the lease, on the ground that they are an operating expense. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634.

¹*Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 436, 29 L. ed. 968; *Mittenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 805; *Meyer v. Johnston*, 53 Ala. 337; *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 109; *Bank of Montréal v. Chicago, C. & W. R. Co.* 48 Iowa, 518; *Hoover v. Montclair & G. L. R. Co.* 29 N. J. Eq. 4; *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606.

rolling stock under this class of leases and uses it, or signifies his intention of retaining the same by other unequivocal acts of ownership, as the sale thereof, with the other property embraced in the foreclosure, he must pay a reasonable rental therefor during the time it is in his possession and use,' and in some cases the

¹As to the right of the mortgagee to hold the rolling stock under his mortgage, where the rolling stock is by the Constitution or statutes made personal property, see *Radebaugh v. Tacoma & P. R. Co.* 8 Wash. 570; *Hammock v. Farmers' Loan & T. Co.* 105 U. S. 77, 26 L. ed. 1111; *Hoyle v. Plattsburg & M. R. Co.* 54 N. Y. 814; *Vilas v. Page*, 106 N. Y. 439. But see *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 260.

In *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 42 Fed. Rep. 6, rolling stock under a car trust lease was taken possession of by a receiver and continuously used by him without objection from the bondholders or trustees and payments were made on the rentals from the income. On application by the lessor it was held that the retention and use of the cars by the receiver and the nonaction of the bondholders did not amount to a conversion; that the lessor was not entitled to the rental according to the terms of the lease out of the corpus of the estate, but only to a return of the cars within a reasonable time, if so demanded, and a *quantum meruit* for the use thereof. In *Coe v. New Jersey M. R. Co.* 27 N. J. Eq. 87, it was held that if the lessors were willing to accept for the rolling stock in the hands of the receiver what in fact it was worth irrespective of the price fixed in the agreement and to allow on such price what had been received by them on account of rent the receivers would be authorized to purchase the rolling stock at its true value and pay for the

same in certificates. In *Taylor v. Philadelphia & R. R. Co.* 9 Fed. Rep. 1, where the net earnings were sufficient for the purchase of additional rolling stock, the court refused to permit the receiver to raise money for such purpose by the creation of a car trust. In *Fordick v. Schall*, 99 U. S. 235, 25 L. ed. 339, it was held that the mortgagees under a contract of this character took only such title under their mortgage as the mortgagor held, no more and no less; that the mortgagee's title was subject to the rights of the vendor in the rolling stock, and the decree of the court ordering a return of the rolling stock to the vendor was proper. The receiver was directed to pay, for the use of the cars, out of the funds in his hands the sum of \$14,568.75, as rent for the period the cars were in use before the appointment of the receiver, but on appeal this order was reversed on the ground that there was no fund subject to the payment of the rental except the fund arising from the sale of the mortgage property, to which fund the rolling stock had in no way contributed; that the vendor as to such claim was but a general creditor. In *Meyer v. Western Car Co.* 102 U. S. 1, 26 L. ed. 59, the doctrine of *Fordick v. Schall*, *supra*, was adhered to so far as the title of the vendor as against the mortgagee was concerned. It was also held that the receiver must pay, from the fund in his hands to the credit of the suit, compensation for the use of the cars during the time they were in his pos-

contract price. In reference to the amount of rental which the receiver will be required to pay for the use of rolling stock while

session, the amount being substantially agreed upon. In *Mittenberger v. Logansport, O. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, the receiver was authorized to pay as rental of a leased line of road what such rental was reasonably worth during the time it was in the use of the receiver, and not the contract price. In *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 84 L. ed. 379, one question before the court was as to the method of ascertaining the reasonable rental. It was held that the reasonable value irrespective of use was the true measure and not the actual mileage. In *Thomas v. Western Car Co.* 149 U. S. 95, 87 L. ed. 663, it was held that a debt due a car company for the use of rolling stock prior to the appointment of a receiver is not a preferred debt having priority over the mortgage lien; and it is also held that the lessor is not entitled to interest on a debt due for rental from the receiver while the property is in use by him.

In *Sunflower Oil Co. v. Wilson*, 142 U. S. 813, 85 L. ed. 1025, Mr. Justice Brown says: "Upon taking possession of the property he was entitled to a reasonable time to elect whether he would adopt this contract and make it his own, or whether he would insist upon the inability of the company to pay, and return the property in good order and condition, paying of course the stipulated rental for it so long as he used it." *Turner v. Richardson*, 7 East, 335; *Com. v. Franklin Ins. Co.* 115 Mass. 278; *Sparhawk v. Yerkes*, 142 U. S. 1, 85 L. ed. 915. If he elects to take property subject to a condition, he is bound to perform the condition before he can obtain title to the property. He may, however, de-

cline to assume this obligation and return the property to the purchaser upon complying with the terms of the contract with respect to such return. *Southern Exp. Co. v. Western N. O. R. Co.* 99 U. S. 191, 25 L. ed. 319.

In *Radebaugh v. Tacoma & P. R. Co.* 8 Wash. 570, it is held that, under the laws of Washington (Gen. Stat. 1646 *et seq.*), a mortgage upon the real estate of a railroad and purporting to cover the rolling stock also does not bind the latter class of property when the instrument is executed and recorded as a real-estate mortgage and does not comply with the formalities in the execution of a chattel mortgage. It is also held that the appointment of a receiver of a railroad corporation has the same effect in law as though the creditors whom he represents had taken possession of the rolling stock under legal proceedings and the right of the mortgagee to take possession of the rolling stock does not give the mortgagee any priority over creditors when its right of possession accrues subsequent to the appointment of the receiver.

In *Thomas v. Western Car Co.* 149 U. S. 95, 87 L. ed. 663, a debt due from a car company for rental of cars prior to the commencement of a suit to foreclose a mortgage on the road and the appointment of a receiver, is held not to be a preferred debt having priority over the mortgage debt. It was also held that where a corporation for the manufacture and sale of cars deals with a railroad company whose road is subject to a mortgage securing outstanding bonds, the holder of a claim under such contract occupies a very different position from workmen and employees and must be

retained by him, though frequently passed upon by the courts, has not, as yet, met with such uniformity of treatment as renders it possible to fix definitely the underlying principles governing the matter. It would seem, however, that a careful examination of the cases will establish the following propositions as reasonably well settled:

(a) The receiver not being required to adopt the contract as an entirety, and exercising his discretion by refusing to adopt it, need not adopt the terms of payment, but must in equity pay a reasonable price for the use of the property while he retains it.

(b) If in the exercise of his discretion he adopts the contract as an entirety he must pay the contract price.

(c) Even as between the original parties the contract price stipulated does not necessarily represent a just and equitable rental value, the contract being intended as essentially a sale contract in most cases rather than a lease.

(d) The vendee-lessee being, as a rule, wholly unable to complete his contract, the vendor-lessor is entitled to a return of his property, and, on proper demand upon the receiver therefor and a refusal, should be entitled to compensation for the use of the

regarded as contracting upon the responsibility of the railroad company and not in reliance upon the interposition of a court of equity.

In *Fosdick v. Southwestern Car Co.* 99 U. S. 256, 25 L. ed. 344, a car contract providing that the cars should be the property of the seller until paid for, it was held that the lien of the seller was not subordinated to the lien of a pre-existing mortgage.

In *Meyer v. Western Car Co.* 102 U. S. 1, 26 L. ed. 59, it appeared that a railroad company, after executing a mortgage to secure its bonds covering all the property it then possessed or might thereafter acquire, entered into a written contract whereby it leased for a specific period, and at stipulated sums payable monthly, certain cars,

and reserved the right, which was never exercised, of purchasing the cars at the original cost at any time during the contract. The seller reserved the right to rescind the contract if the company failed to pay the interest on its bonds. The mortgagor filed a bill to foreclose his mortgage, in which case a receiver was appointed who took charge of the road and used the leased cars in operating it. It was held that the contract was binding between the parties, and the failure to record the contract did not, under the Iowa statutes, render the cars subject to the lien of the mortgage; that the seller was entitled to the possession of them and compensation for their use by the receiver, payable out of the funds in his hands.

property at the stipulated rental, on the principle that the receiver by his act makes the contract his own by adoption.'

¹ In *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 43 Fed. Rep. 6, the receiver, upon the abandonment of a receiver, petitioned the court for a return of its cars within thirty days thereafter, said cars being sold under a car trust contract. They were not returned, but were continuously used by the receiver without objection from the bondholders or the trustee, and payments were made upon the rental. After a further lapse of three months a second petition was filed stating the facts asking for a rule on the receiver to pay the amount due under the car trust contract, and asking to have the same declared a prior lien upon the rentals of the road as well as upon the property embraced in the mortgages. It was held that the retention and use of the cars by the receiver, the bondholders taking no action, did not amount to a conversion; that petitioner was not entitled to payment according to the terms of the lease out of the corpus of the estate, but only to a return of the cars within a reasonable time if so demanded, and a *quantum meruit* for the use thereof. But see *Miltnerberger v. Logansport, O. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596. In *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 479, 29 L. ed. 979, it was held that car rentals accruing before the receiver was appointed are not entitled to be first paid out of the corpus of the property.

In *Woodruff v. Erie R. Co.* 98 N. Y. 609, it is held that a receiver, by entering into possession of and keeping leased property, manifested by an unequivocal act his election to regard

the continuance of such lease as beneficial for all the parties interested, and his intention to continue the interest acquired by the railroad company under such lease. He could not take possession of the property, and enjoy its use and occupation without incurring a liability for the payment of the rent under the lease by which his predecessor secured its collection. The principles which govern the liability of an assignee of a lease seem to be applicable to the case of a receiver, and he would be equitably and legally chargeable with the payment of rent under a lease for such time as he continued to occupy the property demised. While it was competent for him at any time to negotiate anew and secure a modification of the terms of the lease with the consent of the various parties interested, or to repudiate the lease and surrender the property, yet, not having done so, he must be held to continue his acceptance under the terms and conditions of the existing lease as to the payment of rent thereon. See *Martin v. Black*, 9 Paige, 641, where the same principle is applied to an executor who takes possession of leased property under a lease to his testator. See also *Miltnerberger v. Logansport, O. & S. W. R. Co.* 96 U. S. 286, 27 L. ed. 117.

In *People v. National Trust Co.* 82 N. Y. 283, a receiver was appointed on the application of stockholders over a railroad, and such receiver occupied leased premises from May 1, 1876, until February 1, 1879, when he abandoned possession, having paid rent up to that time. Subsequent to the abandonment the corporation was dissolved and the receiver continued,

but an application was made by the lessors for an order on the receiver to pay rent accruing subsequent to his abandonment. It appeared that he had paid all admitted debts, and had deposited a sum sufficient to pay all disputed claims, including the rent accrued and to accrue, upon the lease in question, and that there was still a large surplus distributable among the stockholders. It was held that the lessors were entitled to the relief sought.

In *Com. v. Franklin Ins. Co.* 115 Mass. 278, it is said that the receivers have elected to take possession and assume the liability to pay the rent according to the covenants of the lease, if they retained it for the interest of the creditors, but until such election, or the doing of some act which would, in law, be equivalent to an election, they are not liable. As receivers they cannot be held merely on the covenants, but become liable solely by reason of their own acts. *Turner v. Richardson*, 7 East, 335. It is also held that the payment of a quarter rent by the receiver as a compromise is not to be construed as an election. To amount to an election there must be some occupation and use of, or some dealing and intermingling with, the estate, or some act, admission, or agreement which, in terms, or by necessary implication, indicates an election. Citing *Copeland v. Stephens*, 1 Barn. & Ald. 593; *Ansell v. Robson*, 2 Crompt. & J. 610; *Hanson v. Stevenson*, 1 Barn. & Ald. 303; *Thomas v. Pemberton*, 7 Taunt. 206; *Hill v. Dobie*, 8 Taunt. 325; *Ex parte Faxon*, 1 Low. Dec. 404; *Martin v. Black*, 9 Palge, 641; *Hoyt v. Stoddard*, 2 Allen, 442.

When, at the instance of a general creditor, a receiver of a railroad company and its rolling stock is appointed and with the latter its rolling stock

leased to the company with the right of purchase, and there being a default in the running of the road by the receiver, and the rental is not paid, and the lessor takes possession of his rolling stock, his claim for rent is not entitled to priority over the mortgage on the foreclosure sale of the road under the mortgage. *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 84 L. ed. 879. In this case Mr. Justice Brewer, in speaking of the granting of preferences over the mortgage, says: "The appointment of a receiver vests in the court no absolute control over the property and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested contract priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have

an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

In *Re Oak Pitts Colliery Co.* L. R. 21 Ch. Div. 322, it is said that when the liquidator retains the property for the purpose of disposing of it, or when he continues to use it, the rent ought to be regarded as a debt contracted for the purpose of winding up the company and ought to be paid in full, like any other debt or expense properly incurred by the liquidator for the same purpose, and in such case it appears that the rent for the whole period during which the property is so retained or used ought to be paid in full, without reference to the amount which could be realized by a distress. Cf. *Re Lundy Granite Co.* L. R. 6 Ch. 462; *Re Brown, Bayley, & Dixon*, L. R. 18 Ch. Div. 649.

In *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 82 Fed. Rep. 566, it appeared that a railroad company had promised the owner of a sawmill, where one of its switches was not used for the receiving of freight, but only to get sand for track repairing, that it would take up lumber for him at that point in certain quantities. A short time after the contract was made the

mill owner was notified that the road would refuse to receive any more lumber at the switch, and then the road passed into the hands of the receivers. It was held that even if the contract could not be terminated by the company at its pleasure, the claim for damages for its breach did not entitle the mill owner to an allowance against the property in the hands of the receiver or out of the earnings of the road in priority to the mortgage.

As to the payment of a reasonable price, see *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 42 Fed. Rep. 6; *Coe v. New Jersey M. R. Co.* 27 N. J. Eq. 87; *Mittenberger v. Logansport, O. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 663.

As to the payment of the contract price, see *Farmers' Loan & T. Co. v. Northern P. R. Co.* 58 Fed. Rep. 257; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Fosdick v. Southwestern Car Co.* 99 U. S. 256, 25 L. ed. 314; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 29 L. ed. 963; *Peoria & P. U. R. Co. v. Chicago, P. & S. W. R. Co.* 127 U. S. 200, 32 L. ed. 110; *Kneeland v. American Loan & T. Co.* 136 U. S. 104, 34 L. ed. 385; *Sunflower Oil Co. v. Wilson*, 142 U. S. 318, 35 L. ed. 1025; *United States Trust Co. v. Wabash W. R. Co.* 150 U. S. 287, 37 L. ed. 1085.

As to mode of ascertaining what is reasonable rental, see *Kneeland v. American Loan & T. Co.* *supra*.

As to rentals generally, see *Taylor v. Philadelphia & R. R. Co.* 9 Fed. Rep. 1; *Meyer v. Western Car Co.* 102 U. S. 1, 26 L. ed. 59; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632; *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 36 L. ed. 640; *Seney v. Wabash W. R. Co.* 150 U. S. 810, 37 L. ed. 1092; *Farm-*

§ 281. Claims not preferential.

There is a class of unpreferred claims which are not considered as having any special equitable features and are not entitled, therefore, to preferential payment from the income or corpus of the mortgaged property in priority to mortgage liens. This class, of course, is extensive and embraces all claims not preferential and not secured by mortgage, and embraces such as (a) advances made to complete the road;¹ (b) damages occasioned by fire;² (c) attorneys' fees earned before appointment;³ (d) articles sold to the company after the mortgage is given;⁴ (e) locomotives

ers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. Rep. 257.

Where the receiver is directed by the courts to take possession of leased property, as sleeping cars, with full knowledge of the covenants, and he continues the use of such property until the expiration of the term, he will be liable for necessary repairs, in the same manner and to the same extent as the lessee. *Easton v. Houston & T. O. R. Co.* 88 Fed. Rep. 784.

The mere appointment of a receiver for a railway company is not a breach of a contract by the company for the purchase of goods so as to relieve the other party to the contract from the necessity of performing before bringing an action for breach of the contract. *Diamond State Iron Co. v. San Antonio & A. P. R. Co.* (Tex. Civ. App.) 83 S.W. 987.

¹In *Kelly v. Green Bay & M. R. Co.* 5 Fed. Rep. 846, a claim for advances made to a railroad company for the purpose of completing the construction of the road will not be preferred to the mortgage lien, unless the advances were made in consequence of the requests, promises, and acts of the bondholders.

²In *Hiles v. Case*, 14 Fed. Rep. 141, damage occasioned by fire along the line of road occasioned by a defective locomotive is not such a claim as to

constitute part of the operating expenses and has no equity superior to that of the bondholders.

³In *Blair v. St. Louis, H. & K. R. Co.* 23 Fed. Rep. 521, the claim of an attorney for fees earned a year and a half before the appointment of a receiver are not entitled to preference, but where the annual salary of an attorney falls due only a short time before the road is placed in the hands of a receiver he is entitled to priority.

⁴In *United States Trust Co. v. New York, W. S. & B. R. Co.* 25 Fed. Rep. 800, where articles such as clocks were furnished to be used in operating the road which was sold subsequent to the giving of the mortgage, a preference is not allowed.

In *Bound v. South Carolina R. Co.* 51 Fed. Rep. 58, it is held that inasmuch as the services of the attorney had nothing to do with keeping the road a going concern such fees were not entitled to priority.

In *Pennsylvania Finance Co. v. Charleston, O. & O. R. Co.* 52 Fed. Rep. 678, it was held that legal services rendered to a railroad company in maintaining before the courts the validity of municipal aid bonds are not of a character to take precedence of the mortgage bonds. The fact that such services resulted in benefit to the bondholders will not justify the

sold more than six months prior to the appointment.¹ (f) In the matter of construction to be given to car trust contracts or leases, the rule is not uniform but the weight of authority would seem to be that the law of the state where the property is situated governs.² Whether they will be construed as leases or as condi-

displacing of the latter's lien when they were not parties to the contract of employment. See also *Pennsylvania Finance Co. v. Charleston, C. & O. R. Co.* 52 Fed. Rep. 526; *Central Trust Co. v. Valley R. Co.* 55 Fed. Rep. 908.

¹ In *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115, 9 L. R. A. 140, where, more than six months after the sale of locomotives, the road was placed in the hands of a receiver on application of the mortgage bondholders to foreclose a mortgage given long before the sale and covering all the railroad property, both real and prospective, including its earnings, it was held that the debt was properly a general debt of the corporation and not incurred for current expenses proximately connected with the operation of the road where the receiver and the court refused to give the claim a preference over the bondholders.

In *Addison v. Lewis*, 75 Va. 701, it is held that the claims which are entitled to preference are confined to outstanding debts for labor, supplies, equipments, or permanent improvements of the mortgaged property, such as may under the circumstances appear to be reasonable, but the claims of general creditors can never take priority over the mortgage creditors except where it is shown that the general creditors have, by principles of the courts of equity, a superior equity to the lien creditor; that each claim must be determined upon the particular facts showing the particular equity. But see *Union Trust*

Co. v. Morrison, 125 U. S. 591, 31 L. ed. 825, where, after judgment was rendered against the surety on an injunction bond, he intervened and asked the protection of the court as to his claim as against the mortgage bondholders.

² In *Green v. Van Buskirk*, 73 U. S. 5 Wall. 307, 18 L. ed. 599, it is held that the liability of personal property to be sold under writ must be determined by the law of the state where the property is situated, notwithstanding the domicile of all the claimants to the property may be in another state. Title to personal property must be determined by the law of the state where the proceedings are had in regard to the levy and sale thereof. Mr. Justice Miller in this case says, "But after all this is a mere principle of comity between the court which must give way where statutes of the country where the property is situated, or the established policy of its laws, prescribe to its courts a different rule. No one can seriously doubt that it is competent for any state to adopt such a rule in its own legislation since it has perfect jurisdiction over all property, personal or real, within its territorial limits. Every nation having a right to dispose of all the property actually situated within it, has (as has been often said) a right to protect itself and its citizens against the inequalities of foreign laws which are injurious to their interests." And Chancellor Kent, in commenting on the law of contracts, says: "Upon this subject of conflicting laws it may be generally observed that there is a stub-

tional sales turns upon the fact as to whether the rights of creditors are involved, and, if so, then such contracts are fraudulent or at least not enforceable as to third parties.¹

§ 282. Extent of power of railway receiver.

The power of a railway receiver embraces, in addition to the ordinary duty of preserving the property, the additional duties of

born principle of jurisprudence that will often intervene and act with controlling efficacy. This principle is that where the *lex loci contractus* and the *lex fori* as to conflicting rights acquired in each come in direct collusion, the comity of nations must yield to the positive law of the land."

In the case of *Milne v. Moreton*, 6 Binn. 361, the supreme court of Pennsylvania says: "Every country has a right of regulating the transfer of all property within its territory; but when no positive regulation exists, the owner transfers it at his pleasure." Cf. *Lanfear v. Summer*, 17 Mass. 110; Story, Conf. L. § 390. The general rule no doubt is, that in the absence of any local law or policy, transfers of personal property will be respected by the courts of the country where the property is located. But see *Taylor v. Boardman*, 25 Vt. 589; *Ward v. Morrison*, 25 Vt. 598; *Emerson v. Partridge*, 27 Vt. 8; *Olivier v. Townes*, 2 Mart. (N. S.) 93. Cf. *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *McCormick v. Hadden*, 37 Ill. 370.

¹In *McCormick v. Hadden*, 37 Ill. 370, it was held that where the seller delivered possession to the purchaser which was coupled with an agreement that the property is to be considered as belonging to the seller until the payment of the purchase money, notwithstanding such delivery of possession, such agreement as to creditors of the purchaser is fraudulent and void.

In *Hervey v. Rhode Island Locomo-*

tive Works, 93 U. S. 664, 23 L. ed. 1003, the doctrine of *Green v. Van Buskirk*, 72 U. S. 5 Wall. 307, 18 L. ed. 599, is affirmed, and it is held that the real owner of personal property who vests another to whom it is delivered with an interest therein, must, if desirous of preserving a lien on such property, situated in Illinois, comply with the requirements of the laws of that state. And that, where personal property has been sold and delivered, secret liens treating the seller as its owner until the payment of the purchase money cannot be maintained in such state. Such contracts are constructively fraudulent as to creditors and the property, so far as their rights are concerned, is considered as belonging to the vendee holding the possession. The law in such case is not changed by reason of the agreement assuming the form of a lease, the real purpose of the parties being looked to to determine the nature of the contract. See also to the same effect *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, and where it is also held that as between the parties, notwithstanding the statute, the transaction is just what on its face it purports to be, *i. e.*, a conditional sale with a right of rescission on the part of the vendor in case the purchaser shall fail in payment of his instalments, a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of losing his lien if it works a legal wrong as to third parties. *Murch v. Wright*, 46 Ill. 486.

a manager, and this carries with it the necessary power of properly and adequately performing the appropriate functions pertaining to his office. Assuming, as he does, under the direction of the court, the exercise, for the time being, of the franchises of the corporation, and at the same time taking upon himself the efficient and economical management of the road, and charged, as he is, with the duty of preserving the property from deterioration and maintaining its integrity as a going concern, it is only possible for him to do so by investing him with a large measure of discretionary as well as plenary power adequate to the duties imposed. His responsibility to the court, the parties, and the public, necessarily implies power coextensive with duties of his three-fold relationship, and more extensive than those pertaining to the ordinary *pendente lite* receivership. The receivership property being *in custodia legis*, it is protected from interference by execution, attachment, garnishment, or trustee process.¹ Of course, it must be understood the power of the receiver emanates from the court, he being in fact the hand of the court, or the instrumentality by which the will of the court is put into execution and made effective.²

§ 283. General scope of his power.

The scope of power ordinarily exercised by the railway receiver in the performance of the functions pertaining to his office may be stated in general terms as follows:

(a) The preservation of railway property, whether at the instance of the mortgagee, creditors, or stockholders, if necessity implies the continued operation of the road as a going concern,

¹ *Russell v. Texas & P. R. Co.* 68 Tex. 646; *Richards v. People*, 81 Ill. 551; *Bell v. Chicago, St. L. & N. O. R. Co.* 84 La. Ann. 785; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Texas Trunk R. Co. v. Lewis*, 81 Tex. 10.

² In *Memphis & C. R. Co. v. Hoechner*, 67 Fed. Rep. 456, it is held that a receiver appointed by a court of equity to hold, manage, and operate an insolvent railroad company is not the agent of the insolvent railroad corporation,

but the hand of the court appointing him, and holds, manages, and operates the property under the orders and directions of the court as its custodian and not for or under the control of the directors or shareholders of the corporation. His management is for the benefit of those ultimately entitled under the decree of court. His acts are not the acts of the corporation, and his servants are not the agents or servants of the corporation.

and this in the very nature of things embraces all necessary contracts for labor and supplies such as will enable the receiver to preserve the property for the benefit of the parties in interest, and at the same time subserve the public interests.¹

(b) It is also a part of his duty which includes the necessary power therefor to collect in all outstanding indebtedness due the company.²

¹ In *Lehigh Coal & Nav. Co. v. Central R. Co.* 41 N. J. Eq. 167, it is held that a receiver of an insolvent railroad company has power to make such contracts for labor and supplies as are reasonably necessary for him to perform the duties of his appointment. And equity will enforce such contracts against the trust. To the same effect is *Ex parte Carolina Nat. Bank*, 18 S. C. 289; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 436, 29 L. ed. 963; *Clarke v. Central R. & Bkg. Co.* 66 Fed. Rep. 16; *Platt v. Philadelphia & R. R. Co.* 65 Fed. Rep. 660; *Phinizy v. Augusta & K. R. Co.* 62 Fed. Rep. 771; *Continental Trust Co. v. Toledo, St. L. & K. O. R. Co.* 59 Fed. Rep. 514; *Lehigh Coal & Nav. Co. v. Central R. Co.* 41 N. J. Eq. 167.

The ordinary outlays a receiver is permitted to make are to keep the road, buildings, and rolling stock in repair, and such additional facilities as the business may require. Extraordinary outlays must receive the sanction of the court. *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606.

If the receiver in the operation of the road creates an indebtedness, with the consent of the lienholders, which is beyond the income, it may be paid from the proceeds of the corpus. *Hand v. Savannah & O. R. Co.* 17 S. C. 219.

Traffic balances are necessary expenditures. *Langdon v. Vermont & O. R. Co.* 54 Vt. 593; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Central Trust Co.*

v. Ohio O. R. Co. 23 Fed. Rep. 306, 23 Am. & Eng. R. Cas. 666; *Philadelphia Invest. Co. v. Ohio & N. W. R. Co.* 41 Fed. Rep. 878.

In *Woodruff v. Erie R. Co.* 93 N. Y. 609, it was held that the court had full authority to direct how the railroad property should be managed while in the possession of the receiver; that whatever might be the rights of the various parties as between themselves to priority in the distribution of the assets of an insolvent corporation, such rights could affect only the property remaining after the liabilities created by the receivership had been fully paid.

² The receiver of a railroad may properly, in exercise of his business judgment, give an unusually low rate in order to introduce into general use a cheap and valuable article which, if brought into general demand, would add to the freight receipts of the road handling it. *Clarke v. Central R. & Bkg. Co.* 66 Fed. Rep. 16.

In *Langdon v. Vermont & O. R. Co.* 54 Vt. 593, it is held that where a court of equity charges receivership property on behalf of bona fide creditors with an equitable lien, the equitable charge does not arise from nor depend upon the contract relation of the parties, but solely from the act of the court.

In *Bank of Montreal v. Chicago, O. & W. R. Co.* 48 Iowa, 518, it was held that the receiver had no power to issue certificates in payment for ma-

(c) And reduce to his possession the property of the company in the possession of or held by persons or corporations for its benefit and use.¹

(d) He may disaffirm the unlawful acts of the officers and directors of the company.²

(e) He may also restrain the performance of illegal acts which have the effect of rendering the title and rights to the receivership property of less value.³

material until such material had been furnished, and, having issued certificates for material contracted to be delivered, but which in fact never was delivered, such certificates were void.

In *Re Seattle, L. S. & E. R. Co.* 61 Fed. Rep. 541, it is held that a receiver of a railroad company is not bound by an agreement made before his appointment between the railroad company and its employees whereby the latter are not to be discharged except for cause, to be determined by arbitrators.

¹ In *Terry v. Bamberger*, 14 Blatchf. 234, it was held that a receiver had a right of action against one for conversion of the property of the company made prior to his appointment.

² In *Wardell v. Union P. R. Co.* 103 U. S. 651, 26 L. ed. 509, it is held that the directors of a corporation were subject to the obligations which the law imposes upon trustees and agents and cannot therefore, with respect to the same matters, act for themselves and for it, nor occupy a position in conflict with its interest.

In *Flint & P. M. R. Co. v. Dewey*, 14 Mich. 477, it is said that the law would not permit an agent to place himself in a situation in which he may be tempted to disregard the interest of his principal for his own private gain. And to the same effect is *Kitchen v. St. Louis, K. C. & N. R. Co.* 69 Mo. 224, as well as *Stewart v.*

Lehigh Valley R. Co. 38 N. J. L. 504, and the *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 586.

In *European & N. A. R. Co. v. Poor*, 59 Me. 277, it is held that if a director of a railroad company enter into a contract for the construction of the road he cannot then, or subsequently, derive any benefit personally from such contract.

In *Hoyle v. Plattsburg & M. R. Co.* 54 N. Y. 314, it is held that the officer of a railroad company occupies the position of a fiduciary character and is incapacitated from dealing in his own behalf in respect to the corporation property or in respect to any matters involving his powers and duties as a director. He cannot become the purchaser of property of the corporation under an execution sale, and in such case actual fraud or actual advantage need not be shown. This was in an action brought to foreclose a mortgage of the railroad corporation in which a receiver was appointed.

In *Paine v. Lake Erie & L. R. Co.* 31 Ind. 283, 353, it is held that the directors of a railroad company could not acquire an interest in the profits of a contract for the construction of the road, such as would give them a standing in a court of equity. Their relations to the company forbade such an agreement.

³ In *Davis v. Gray*, 83 U. S. 16 Wall. 203, 21 L. ed. 447, suit was brought

(f) He is empowered to defend all suits and proceedings in the interest of those whom he represents, when in the exercise of a sound judgment a defense will be available.'

(g) He may make all necessary arrangements for the transaction of the business of a common carrier, including accommodations with connecting lines.'

to enjoin the Memphis, E. & P. R. Co. from disposing of its effects, in which action a receiver was appointed and required to take possession of the money and assets, real and personal, of every kind belonging to the railroad company, and subsequently an order was made that the receiver should be authorized and empowered to defend and continue all suits brought by or against the railroad company before or after his appointment, and a suit was instituted by the receiver in his own name to enjoin the defendants from all illegal acts which the bill alleges, if done, would render the rights and title of the company to its property of greatly diminished value, if not wholly worthless. The court says: "We think it is competent for him to perform this function in the mode he has adopted. The decree in the case wherein he was appointed expressly authorizes him to sue for that purpose in his own name. The order was made by a court of adequate authority and in the regular exercise of its jurisdiction." The proceeding by the receiver was held to be auxiliary to the original suit. The court further says: "In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. It is not unusual for courts of equity to put them in charge of railroads or companies which have fallen into financial embarrassments, and require them to operate such road until the

difficulties are removed or such arrangements are made that the roads can be sold with the least sacrifice of the interest of those concerned.

¹In *Bartlett v. Keim*, 50 N. J. L. 260, it is held that a receiver of a railroad has the right to set up, as a defense against a suit for injuries sustained from negligence in running the trains by such receiver, the statute of limitations.

²In *Biers v. Wabash, St. L. & P. R. Co.* 34 Fed. Rep. 244, 35 Am. & Eng. R. Cas. 646, it was held to be the duty of a receiver of a railroad, who controls its operation and who is no less a common carrier because the property is in the custody of the court, to receive and transport cars and freight, and to furnish accommodations to connecting lines to the same extent and in the same manner as are the proper officers of railroad companies. The court say: "His rights and duties are those of a carrier. He is bound to afford to all railroad companies whose lines connect with his equal facilities for the exchange of traffic. It is his duty to receive from and deliver to other connecting roads both loaded and empty cars. He cannot discriminate against one road by maintaining a policy of nonintercourse with it." See also *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.* 34 Fed. Rep. 481.

In *Philadelphia Invest. Co. v. Ohio & N. W. R. Co.* 41 Fed. Rep. 378, where a receiver of a railroad company made an arrangement for the

(h) He cannot be compelled to complete the unfinished contracts of the corporation if not advantageous to the estate;¹ but the rule is otherwise if the contract is performed upon one side,²

transportation of freight and passengers with another railroad company over the line of his road, and there was nothing making the arrangement obligatory on either party for any stated period of time, it was held that the receiver may terminate the arrangement at will without previous notice.

¹ In *Southern Rap. Co. v. Western N. O. R. Co.* 99 U. S. 191, 25 L. ed. 319, it appeared that a contract was made between the express company and the railroad company by which the latter should give the former the necessary facilities for the transaction of all its business upon the road, forward without delay by the passenger trains both ways, haul the express matter that should be offered, in consideration for which the express company was to loan to the railroad company twenty thousand dollars to be expended in repairs and equipments for the road, the contract to continue for the period of one year, and until the principal and interest of the debt should be fully paid. This contract the receiver refused to carry out, and a bill for specific performance was filed against him. The court refused to grant the prayer of the petition on the ground that the road was in the hands of a receiver in a suit brought by the bondholders to foreclose their mortgage; that the express company had no lien; that it was simply a contract for the transportation of persons and property over the road, and the specific performance by the receiver would be a form of satisfaction or payment which the receiver could not be required to make. The court say: "As well might he be decreed to sat-

isfy appellant's demand by money as by the service sought to be enforced. Both belong to the lienholders and neither can be thus diverted."

² In *Central Trust Co. v. Ohio C. R. Co.* 23 Fed. Rep. 306, 23 Am. & Eng. R. Cas. 666, the receiver was authorized to continue a pooling contract in force at the time of his appointment. The court say: "The existence of this contract, it must be presumed, was well known to those who are now seeking to repudiate it; if not, it might have been by the exercise of the slightest diligence. In consequence of casualties not foreseen at the beginning it has eventuated in the accumulation of the cash balance now in controversy. The contract has been fully executed as to the transactions and business out of which that balance has grown." As to the question of an unperformed and executory contract, the court say: "The question now presented to me is not whether an unperformed and executory contract shall be enforced, nor whether damages shall be recovered against a party who refuses to operate under it. It is whether one party who has received all the expected benefits to be derived from it shall account for the fruits of its performance, which, by its terms, belong to another, and which, contrary to its terms, it retains. The contract, whether legal or not, was not binding on the complainant or the receiver, and if objected to in season, proper instructions would have been given in reference to its recognition and adoption. Failing to take proper steps to that end the receiver was necessarily left at liberty to exercise his own

or the receivership property has received the benefit of the contract.¹

(i) He may adopt or refuse to adopt the unexpired leases of the corporation, and is entitled to a reasonable time in which to exercise his option.²

judgment and discretion in reference to it. The contract itself was a customary one among railroads, and the receiver believed it to be reasonable and fair, and that it was expedient to continue it in force. This was done with the result already stated. Good faith requires that the proceeds arising from its operation, and which, by its terms, belonged to the petitioner, should be paid over to it without regard to the question now made as to the original validity of the contract."

¹ In *Easton v. Houston & T. C. R. Co.* 38 Fed. Rep. 784, where the receiver was authorized to take charge of all the company's property including leases, and carry on the road, and have the use and benefit of certain sleeping cars with knowledge of the terms of a lease under which the cars were held and used, it was held that the receivers became the assignees of the railroad company, and were bound to perform the covenants of the lease as to the care and terms of the leased cars. It appeared that the receiver used the leased cars, operated the same, and enjoyed all the advantages thereof for the benefit of the trust fund, and were thereby legally and equitably obligated to perform the several covenants of the railroad company. The lease in this case was an entirety and of necessity an assignment and the assumption thereof was of the whole and not any particular part. Cf. *Woodruff v. Erie R. Co.* 98 N. Y. 619; *Dorrance v. Jones*, 27 Ala. 630; *Pugsley v. Aikin*, 11 N. Y. 494; *Sutcliffe v. Atwood*, 15 Ohio St. 186; *People, Grissler, v. Dudley*, 58 N. Y. 323.

² In *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 84 Fed. Rep. 259, it was held that the mere fact of taking possession of the leased lines forming a continuous road over which the receivers were appointed did not make the receivers assignees so as to make the rentals due under such leases prior to the mortgages. See also *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 46 Fed. Rep. 26; *Park v. New York, L. E. & W. R. Co.* 57 Fed. Rep. 799; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.* 58 Fed. Rep. 268. In the last-named case it was also held that the use of a leased line for a considerable period did not work an adoption where the lessor had not demanded a surrender. *Ames v. Union P. R. Co.* 60 Fed. Rep. 966; *Central Trust Co. v. Charlotte, C. & A. R. Co.* 65 Fed. Rep. 264.

In *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632, it was held that the receivers, by the occupation of the road under the order of the court, were not obliged to pay rental under a lease made with the insolvent corporation. The court adopts the rule established in bankruptcy matters that a reasonable time is allowed to the receivers to ascertain the value of the lease before exercising their election; that in such case receivers will not be required without their consent to take that which will charge the estate with a burden. *Glenny v. Langdon*, 98 U. S. 20, 25 L. ed. 43; *American Fils Co. v. Garrett*, 110 U. S. 288, 28 L. ed. 149; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. ed. 915; *Martin v. Black*, 9 Paige, 641; *Com.*

§ 284. Limitations on receiver's power.

The receivership property being held by the receiver in behalf of mortgagees, creditors, or stockholders, and thus impressed with a species of trust relationship, it follows that there must of necessity be certain limitations upon his power in his dealings therewith. All his contracts, likewise, are made with reference to the receivership fund or property in his custody, and the *res* or the income is impressed with the ultimate payment of all indebtedness incurred in the management of the road. Hence it is that the rule has become well settled that all persons dealing with the receiver in his official capacity must do so with the knowledge, and are chargeable with notice, of the limitations on his power.¹ If his contracts and transactions have not received in advance the sanction of the court, they are at all times subject to the annulment of the court as not being for the best interests of the estate. Occupying as he does a fiduciary relationship, he is not permitted to become personally interested in the receivership property, or make contracts in his official capacity resulting in his personal gain.² Operating the road, in one sense, in the interest of the public, he cannot make unjust discrimination as to freight rates,³ or form pooling arrangements for discriminating purposes.⁴ He has no discretionary power as to the payment of the corporate debts from the assets or earnings of the road.⁵ He has

v. Franklin Ins. Co. 115 Mass. 278; *Berry v. Gillis*, 17 N. H. 9; *Re Oak Hills Colliery Co.* L. R. 21 Ch. Div. 322; *Sunflower Oil Co. v. Wilson*, 142 U. S. 318, 35 L. ed. 1025.

In *Dawson Mfg. Co. v. Brunswick & A. R. Co.* 51 Ga. 136, it was held that where the contract between the manufacturing company and the railroad company was rescinded for nonpayment of the money stipulated, the railroad company was liable for rent and for damages to the cars while used, on the ground that it could not be presumed to keep and use the cars and not pay for them.

Farmers' Loan & T. Co. v. Chicago & A. R. Co. 43 Fed. Rep. 6. In this

case it was held that the receiver retaining and using the cars made him liable for the rental according to the terms of the lease.

¹ *State v. Edgefield & K. R. Co.* 6 Lea, 353.

² *Farley v. St. Paul, M. & M. R. Co.* 4 McCrary, 138.

³ *Biers v. Wabash, St. L. & P. R. Co.* 34 Fed. Rep. 244, 35 Am. & Eng. R. Cas. 646; *Handy v. Cleveland & M. R. Co.* 31 Fed. Rep. 689.

⁴ *Missouri P. R. Co. v. Texas & P. R. Co.* 31 Fed. Rep. 862, 28 Am. & Eng. R. Cas. 1.

⁵ *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1.

no power to appropriate receivership funds in the promotion or defeating of parallel lines of road,¹ or to grant permission to another road to cross his line of road,² or to contract for municipal aid in building, completing, or equipping a road,³ or lease the receivership road,⁴ and unless specially authorized cannot contract debts on the faith of the receivership property,⁵ and as a rule his power is confined to the property in litigation.⁶ He has no power to grant an annual pass for life,⁷ and has no power to lease for a term of years general offices and thereby bind his successors or the property without the sanction of the court.⁸

§ 285. Liability of railway receivers.

The general liability of receivers has been considered heretofore and only the liability of railway receivers will be considered in this connection in so far as their liability may be different from that of ordinary receivers such as grows out of the varied and more extended duties imposed upon them. The liability of railway receivers is measured by the functions and duties pertaining to his office. Being a common carrier of passengers and property and exercising the franchises of a corporation, he assumes corresponding duties to the public and the patrons of the road, and in

¹ *Cowdrey v. Galveston, H. & H. R. Co.* 93 U. S. 352, 23 L. ed. 950.

² *Howlett v. New York, W. S. & B. R. Co.* 14 Abb. N. C. 328.

³ *Smith v. McCullough*, 104 U. S. 25, 26 L. ed. 687.

⁴ In *McMinville & M. R. Co. v. Huggins*, 8 Baxt. 177, it is held that a receiver of a railroad company has no power to lease the receivership road so as to vest in the lessees an interest in the road and its franchises, which could not be divested by a subsequent act of the legislature.

⁵ In *Hand v. Savannah & C. R. Co.* 17 S. C. 219, it was held that claims against the receiver of an insolvent railroad company for moneys, services, supplies, damages, and necessary expenses of the management cannot be paid from the proceeds of the mortgaged property where such

proceeds were insufficient to pay the mortgage debt; that, unless specially authorized by the court to contract debts on the faith of the property, the receiver is restricted to the income and profits of the road.

⁶ In *Noyes v. Rich*, 52 Me. 115, it is held that the receiver's right to custody of the property extends only to the property which is the subject-matter of the litigation, but the rule is otherwise where the receiver is appointed under a creditor's bill, in which case he takes the whole estate. To the same effect is *Smith v. McCullough*, 104 U. S. 25, 26 L. ed. 687.

⁷ *Martin v. New York, S. & W. R. Co.* 36 N. J. Eq. 109.

⁸ *Chicago Deposit Vault Co. v. McNulta*, 152 U. S. 554, 38 L. ed. 819.

general is liable to the same extent, and his liability is governed by precisely the same principles as are applicable to ordinary carriers. His relations to the public and to his employees are in no manner limited or modified by reason of his official position or trust relationship. It may be stated in general terms therefore:

(a) A receiver exercising the functions of a common carrier by virtue of the franchises of a railway corporation should be held amenable in his official capacity to the same rules of liability that are applicable to the company while it exercises the same powers in operating the road.¹

¹ In *Klein v. Jewett*, 26 N. J. Eq. 474, the vice chancellor says: "I think the rule may be considered settled that where the injury results from default or misconduct of a receiver appointed by the court of equity while acting under the color of authority of the court,—there being no dispute as to the power of the court to make the order under which he claims to have acted,—the court may, in its discretion, either take cognizance of the question of the receiver's liability and determine it, or permit the aggrieved party to sue at law. But if the power of the court is disputed the court has no choice; it must assume exclusive jurisdiction and inhibit the aggrieved person from seeking redress against the receiver in any other tribunal. Any other course when its jurisdiction is assailed would be an abandonment by the court of both its power and dignity. *Aston v. Heron*, 2 Myl. & K. 390; *Parker v. Browning*, 8 Paige, 388. * * * It was not seriously disputed that the receiver must be held liable if actionable negligence was shown. It would seem to be clear that no person can be permitted to exercise the rights and power of a common carrier, especially when they embrace the franchise granted to a railway corporation, except subject

to the duties and liabilities of a common carrier. Whether a receiver is regarded as an officer of the law, or the representative of the proprietors of the corporation, or its creditors, or has combined all these characters, he is intrusted with the powers of the corporation, and must therefore necessarily be burdened with its duties and subject to its liabilities. There can be no such thing as an irresponsible power, force, or authority without being subject to duty under any system of laws framed to do justice. It is an inseparable condition of every grant of power by the state, whether expressed or not, that it shall be properly exercised, and that the grantees shall be liable for injuries resulting directly and exclusively from his negligence in its use. Both upon principle and authority I think it must be held that a receiver operating a railroad under an order of a court of equity stands in respect to duty and liability just where the corporation would were it operating the road, and the question whether or not the receiver is liable for negligence must be tested by the same rules that would be applied if the corporation was the actual party defendant before the court." *Blumenthal v. Brainard*, 38 Vt. 403; *Paige v. Smith*, 90 Mass. 395.

To this rule there are the following exceptions: (1) Where a liability is created by statute against the corporation itself which

In *Ex parte Brown*, 15 S. C. 518, it was held that a passenger injured upon a railway while in the hands of a receiver was entitled to damages for such injuries received and to be paid out of the fund in court realized from the earnings of the road during the receivership in preference to mortgage or other debts. It is held it cannot be denied that a company, while managed by its own directors, is liable to demands of this kind, and when managed by a receiver as an officer of the court it is equally liable out of its property to respond to unpaid claims of this kind, whether the cause of action arose before or after the judgment of insolvency and appointment of a receiver. *Ex parte Johnson*, 19 S. C. 492.

In *Meara v. Holbrook*, 20 Ohio St. 137, it is held that a receiver of a railroad operating the same under the order of court in the same manner as a railroad company, and having the exclusive control of the road and its agents and employees in the business, is answerable in his official capacity to his employees and others for injuries sustained through the negligent discharge of his duties by himself or his agents where the railroad company, if it had been operating the road, would have been liable. See also *Potter v. Bunnell*, 20 Ohio St. 150, where it is held that in an action for injuries against the receiver exercising the franchises of the company it must be determined by the principles applicable to a like action against the company when it operates the road.

In *Erwin v. Davenport*, 9 Heisk. 44, an employee was run over and killed by a train of cars, and the receiver was sued under the provisions of the

Tenn. Code for \$10,000 damages. It was held that a receiver under § 1101 of the Code is vested with the powers and duties of the board of directors in managing the affairs of the company and as a public agent of the state; that where the public are concerned receivers are subordinate agents of the state in the discharge of their official duties, and are guilty of wrong to third persons, they are liable to the same extent as private agents and are responsible for misfeasance but not for nonfeasance.

In *Blumenthal v. Brainard*, 38 Vt. 402, receivers were operating a railway under the order of a court of equity, and it was claimed that being agents and officers of that court they were subject to account only to that court, and were entitled to protection in all matters growing out of a performance of their duties as receivers, and therefore could not be made liable as a common carrier or warehouseman, but the court held that the mere fact that they were acting as receivers under the appointment of a court of chancery could not be recognized as a defense to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by them in matters of business conducted or carried on by them while acting as such receivers.

In *Lyman v. Central Vermont R. Co.* 59 Vt. 167, where it appeared that the same person is receiver of one railroad and lessee of another, and both are operated by him together, the leased railway is not receivership property, and an employee could maintain an action at law against him without leave to

recover for injuries resulting from the negligence of his servants in operating the leased road. It is also held that he would be liable as receiver for injuries resulting upon the receivership property to the same extent as a railway company itself. See *Sprague v. Smith*, 29 Vt. 421; *Blumenthal v. Brainard*, *supra*; *Newell v. Smith*, 49 Vt. 255; *Paige v. Smith*, 99 Mass. 191; *Nichols v. Smith*, 115 Mass. 332; *Ballou v. Farnum*, 9 Allen, 47; *Barter v. Wheeler*, 49 N. H. 9; *Lamphear v. Buckingham*, 83 Conn. 237; *Kinney v. Crocker*, 18 Wis. 74; *Allen v. Central R. Co.* 42 Iowa, 683.

Receivers running a road under appointment of a court of chancery in another state who act as common carriers, and are liable in actions at law in the state in which appointed, may be sued as common carriers, in Massachusetts. *Paige v. Smith*, 99 Mass. 395; *Nichols v. Smith*, 115 Mass. 332.

In *Ohio & M. R. Co. v. Davis*, 28 Ind. 553, it is said: "The court cannot permit her possession to result in wrong to one without fault, but upon sufficient proof will grant the relief to which the sufferer may be entitled." It was further held that the railroad company is not liable for an act of negligence of the receiver having possession of such road.

In *Southern Exp. Co. v. Western N. O. R. Co.* 99 U. S. 191, 25 L. ed. 819, the receiver declined to carry out a contract made by the railroad company over which he was receiver with an express company, and a bill for specific performance was filed by the express company. It was held, first, that the receiver was the only necessary party defendant; and, second, that the transaction between the companies was simply a contract for transportation which created no lien, and the specific performance thereof would be a form of satisfaction or payment

which the receiver could not be required to make.

In *Harding v. Nettleton*, 86 Mo. 658, an action was brought in a state court against the receiver of a railroad by permission of the Federal court which appointed him, for the breach of a contract for the purchase of ties made by the railroad before the appointment of a receiver, and it was held that the judgment of the state court could not be enforced against the property of the corporation in the hands of a receiver, but must be presented to the Federal court for allowance and that the latter would determine the manner and time of paying the judgment out of the assets of the road.

In *Sloan v. Central Iowa R. Co.* 62 Iowa, 723, it is held that where the receiver is operating a railroad under the appointment and direction of a court he is included under the terms "persons owning or operating railways" in contemplation of §§ 1278 and 1307 of the Iowa Code, and that such receiver, or rather the property in his hands, is liable for the claim of an employee for injuries received through the negligence of coemployees.

In *Brown v. Brown*, 71 Tex. 355, it is held that the judgment for personal injuries should be against the receiver in his official capacity, leaving the matter of its enforcement to be determined by the court having jurisdiction of the receivership which is in view of the rights of all persons interested in the proper application of the fund in the custody of the court.

In *Missouri P. R. Co. v. Texas P. R. Co.* 30 Fed. Rep. 167, it is held that where a receiver has exclusive charge of the management and of the employment of operatives and employees, the entire control of the company having passed to the receivers as fully as it was before exercised by

is in the nature of a personal or special obligation not assumed by the receiver,' and (2) where contracts exist at the time of the

the officers of the road, the receiver is answerable in his official capacity for injuries sustained in the same manner that the corporation would have been liable. (See note). See also *Pope's Case*, 30 Fed. Rep. 169; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 30 Fed. Rep. 344. In this case it is held that where, except for a receivership, the rights of an intervenor would be determined by the laws of the state in which he resides, as interpreted by the supreme court, the fact that a receivership has been instituted should not be allowed to operate to increase the intervenor's rights.

In *Hornsby v. Eddy*, 56 Fed. Rep. 461, the statute provided "every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees to any person sustaining such damage." Under this statute it was held that a person injured from the negligence of coemployees was in no wise effected by the fact that the railroad was in the hands of a receiver and operated by him. *Union Trust Co. v. Thomason*, 25 Kan. 1.

In *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 26 Fed. Rep. 12, it is held that the fact that a railroad is in the hands of a receiver does not make it any the less liable under § 809 of the Revised Statutes of Missouri for double damages in killing stock.

In *Cardot v. Barney*, 63 N. Y. 281, it is held that a receiver of an insolvent railroad company who is running and operating its road in the absence

of evidence that he assumed to act other than as assignee, or that he held himself out as a carrier of passengers other than as an officer of the court, is not liable in an action for negligence causing the death of a passenger where no personal neglect is imputed to him, either in the selection of his agents or in the performance of duty, and where the negligence charged was that of a subordinate whom he necessarily and properly employed in compliance with the order of the court.

In *Thurman v. Cherokee R. Co.* 56 Ga. 376, it is held that an employee of a railroad company cannot maintain an action against the company for personal injury sustained by him while the road is in the hands of a receiver. See *Henderson v. Walker*, 55 Ga. 481. To the same effect is *Camp v. Barney*, 6 Thomp. & C. 622, 4 Hun, 873; *Metc v. Buffalo, C. & P. R. Co.* 58 N. Y. 61.

¹ In *Ohio & M. R. Co. v. Fitch*, 29 Ind. 498, it is held that where a railroad company, in answer to an action to recover the value of animals killed by their machinery, desires to set up the fact that its road is in the possession and being operated by a receiver of the Federal court, the answer should be accompanied by the original or a copy of the order of the latter court for the appointment; and it is further held that the mere appointment of a receiver with the usual powers of a chancery receiver does not relieve the railroad company from liability to suit, and that the receiver operates the road subject to that liability.

In *McKinney v. Ohio & M. R. Co.* 22 Ind. 99, it is held that a railroad

company is liable for stock killed by its cars, although the road at the time is operated by a receiver. (See statute.) In *Louisville, N. A. & O. R. Co. v. Caudle*, 46 Ind. 277, the same principle is affirmed.

In *Ohio & M. R. Co. v. Russell*, 115 Ill. 52, it is held that in an action against a railroad company to recover double the value of a fence built by the owner or occupant of the premises adjoining the railroad right of way after the neglect or refusal of the company to build the same on notice as required, it is no defense, so far as the corporation is concerned, that its property is in the hands of a receiver or used by another party. It is said that the appointment of a receiver gives to him only the temporary management of its affairs, under the direction of the court, and that the corporation still exists and may exercise its franchises, in so far as it does not interfere with the rightful management of the receiver.

In *Kansas P. R. Co. v. Wood*, 24 Kan. 619, the legislature has passed a law requiring railroad companies to fence their roads or be liable for any stock killed by the trains. A receiver of a corporation was appointed, and after his discharge the property was returned to the possession of the corporation, but, while the possession of the receiver continued, stock belonging to the plaintiffs was killed by the railroad trains at a place where the road was not fenced, and it was held that an action might be maintained against the corporation for the enforcement of the liability imposed by the statute. The decision is based on the ground that a statutory duty was cast upon the company and for such duty it is liable, whether property in the hands of the company can be reached or not.

Kan. Laws 1874, chap. 94, relating to the killing and wounding of stock by railroads, applies to receivers operating a road, who have been appointed by courts of competent jurisdiction. *Rouse v. Redinger*, 1 Kan. App. 355.

In *Turner v. Cross*, 88 Tex. 218, 15 L. R. A. 263, it is held that a receiver is neither property owner, charterer, nor hirer of a railroad operated by him, under article 2899 of the Revised Statutes of Texas, prior to its amendment April 11, 1892, and it is not liable for any injury negligently inflicted upon and resulting in the death of an employee of a road; that when receivers are lawfully appointed they are not the representatives of the company or persons whose property may be placed in their management, though it may in some cases be subjected to liability for charges arising under the permission of the court appointing him or from the negligence of the receivers and their employees.

A railroad company is not liable under the Texas statutes for claims arising out of the management of the road by receivers, upon the redelivery of the property to it, unless funds were expended in betterments during the receivership, or unless the property returned to it is of a value equal to or exceeding the claim. *Missouri, K. & T. R. Co. v. Wylie* (Tex. Civ. App.) 88 S. W. 771.

Where a statute makes a railroad company liable for injury to an employee through the negligence of a coemployee in the same line of employment, it is inapplicable to a receiver of the railroad. *Campbell v. Cook*, 86 Tex. 680; *Allen v. Dillingham*, 60 Fed. Rep. 176; *Bonner v. Franklin Co-Operative Asso.* 4 Tex. Civ. App. 166; *Missouri, K. & T. R. Co. v. Stoner*, 5 Tex. Civ. App. 60. See, *contra*, *Texas & P. R. Co. v. Cox*, 145

U. S. 593, 36 L. ed. 829. But this depends upon the language of the statute, and if the statute is broad enough to embrace a receiver, he is liable. *Sloan v. Central Iowa R. Co.* 62 Iowa, 728; *Bond v. State*, 68 Miss. 648; *Rouse v. Hornsby*, 67 Fed. Rep. 219; *Hornsby v. Eddy*, 56 Fed. Rep. 461.

The Ohio statute giving a right of recovery against a lessor railroad company for wrongs and injuries committed by the lessee company does not give a right of action against the lessor company for wrongs and injuries committed by a receiver of the lessee. *Chamberlain v. New York, L. E. & W. R. Co.* 71 Fed. Rep. 636.

A receiver operating a railroad under the direction of a court of equity is liable to an employee injured by the negligence of a coemployee, under Minn. Gen. Stat. 1894, § 2701, making "every railroad corporation owning or operating a railroad" liable for such negligence. *Mikkelsen v. Trussdale* (Minn.) 65 N. W. 260.

The liability of a receiver appointed to conduct the business of a corporation, pending an action in a United States court, upon a contract which is still executory at the time of his appointment, is not affected by 24 Stat. at L. 554, §§ 2, 3, providing that such receiver shall manage the property according to the requirements of the valid laws of the state in which the property is situated, in the same manner as the owner would be bound to do, as such provisions render him responsible only for things occurring while he is in possession. *Scott v. Rainier Power & R. Co.* 18 Wash. 108.

The Georgia statutes making receivers of railroad companies liable for injuries to persons and property caused by the running of cars on the road, for which the road is liable as

common carrier by the laws of the state, does not make a receiver liable for injuries to an employee knocked from a moving train by striking a structure beside the track, under Ga. Code, § 2083, declaring that railroad companies are liable as common carriers, and, as they have employees who cannot control those running the trains, they shall be liable to such employees as to passengers for injuries arising from the want of care and diligence of the train employees. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 69 Fed. Rep. 353, 357; *Baltimore Trust & G. Co. v. Atlanta Traction Co.* 69 Fed. Rep. 358.

In *Texas & P. R. Co. v. Collins*, 84 Tex. 121, suit was brought for the death of the husband of the plaintiff who was an employee of the railroad, and it was held that the receiver could not be held liable for injuries resulting in death unless the receiver was primarily liable for such death either under the common law or the statutes. See *Yoakum v. Selph*, 83 Tex. 607.

In *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480, it is held that receivers *pendente lite* are officers of the court merely and their functions are limited to the care and preservation of the property commended to their charge and possession, with no authority except what is conferred by the court, and do not represent the corporation in its individual or personal character or supersede it in the exercise of its corporate powers, except in so far as the mortgaged property is concerned. In this respect, except as to the possession and management of the mortgaged property, the corporation is free and unfettered to exercise its franchises, and it was held that with the particular cause of action set out in the complaint the receiver had no connection, and it could not possi-

receiver's appointment executory in their nature, which the court, in the interest of the beneficiaries of the trust fund in the hands of the receiver, will not require him to assume and carry out.¹

(b) If a railroad company is not in the management of its road it cannot be held liable for the negligence of the receiver, who is in such management.²

bly be charged upon the property in the receiver's possession. This was an action of trespass to which the receiver was made a party.

In *Powell v. Dayton, S. & G. R. Co.* 16 Or. 33, it was held that in an action for waste it is no defense to show that at the time of the grievance complained of the corporation was in the hands of a receiver.

Neither a lessor nor lessee railroad company is liable for wrongs and injuries done by receivers who have the sole and exclusive management and control of the property of both roads. *Chamberlain v. New York, L. E. & W. R. Co.* 71 Fed. Rep. 636.

¹ In *Central Trust Co. v. Marietta & N. G. R. Co.* 51 Fed. Rep. 15, 16 L. R. A. 90, it is held that a receiver appointed in a suit by the bondholders to foreclose a mortgage on a railroad could not be compelled to perform a contract of the corporation, although payment had been received on such contract before the appointment of the receiver. This decision is based upon the ground that the enforcement of such a contract against the receiver would be equivalent to requiring the repayment of the money received by the corporation, and this could not be done inasmuch as there was no lien on such money so paid.

In *Southern Exp. Co. v. Western N. O. R. Co.* 99 U. S. 191, 25 L. ed. 319, the same principle is affirmed. See *Frankle v. Jackson*, 30 Fed. Rep. 398.

² In *Pennsylvania R. Co. v. Jones*, 155 U. S. 838, 39 L. ed. 176, it was

held that where a railroad was in the hands of a receiver, but the road was managed and controlled by the agents and employees of the company, and the receiver's functions were restricted to the receipt of its share of the net earnings, the company was liable for personal injury received by a passenger upon the road. This decision was based upon the case of *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 448, 21 L. ed. 675, where it appeared that a railroad company was run on a joint account of the lessees on the Virginia end of the road, and the receiver on the end in the District. It was urged in that case that the company was not liable for anything done while the road was operated by the lessees and the receiver, but Mr. Justice Davis said: "It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter, or the general laws of the state, by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessees does not change the relations of the original company to the public. It is argued, however, that this rule is not applicable where the proceeding, instead of being voluntary, is compulsory, as in the case of the transfer of possession to a receiver by a decree of a court of competent jurisdiction. Whether this be so or not we are not called upon to decide, because it has never been held that the company is relieved from lia-

(c) A receiver may make himself personally liable for injuries resulting from the use of defective machinery where he has knowledge of the existence of such defects.¹

(d) He is liable in his official capacity, as a common carrier for goods lost in shipment,² and for injury occasioned by the carelessness and negligence of his servants.³

(e) He will not be compelled to carry out an executory con-

bility unless possession of the receiver is exclusive, and the servants of the road are wholly employed and controlled by him. In this case the possession was not exclusive nor were the servants subject to the receiver's order alone. On the contrary, the road was run on the joint account of the lessees and the receiver, and the servants employed and controlled by them jointly. Both were, therefore, alike responsible for the act complained of, and, if so, the original company is also responsible for the servants under such an employment in legal contemplation and are as much the servants of the receiver as of the lessees and receiver of the court." *Godfrey v. Ohio & M. R. Co.* 116 Ind. 30; *State v. Wabash R. Co.* 115 Ind. 466; *Bell v. Indianapolis, C. & L. R. Co.* 53 Ind. 57; *Mitz v. Buffalo, C. & P. R. Co.* 58 N. Y. 61; *Turner v. Hannibal & St. J. R. Co.* 74 Mo. 602; *Kansas & G. S. L. R. Co. v. Dorough*, 72 Tex. 108; *Ryan v. Hays*, 62 Tex. 42; *Memphis & L. R. R. Co. v. Stringfellow*, 44 Ark. 323; *Thurman v. Cherokee R. Co.* 56 Ga. 376; *Davis v. Duncan*, 19 Fed. Rep. 477.

But the appointment of a receiver does not relieve the company from the payment of a tax upon gross receipts. *Philadelphia & R. R. Co. v. Com.* 104 Pa. 80.

The statute may, however, make a corporation liable, though in the hands of a receiver. *Brockert v. Central Iowa R. Co.* 82 Iowa, 369; *McNulta v.*

Ensch, 184 Ill. 46; *McNulta v. Lockridge*, 187 Ill. 270.

If the company is in the management of the road and a receiver in receipt of the income, the company is liable. *Pennsylvania R. Co. v. Jones*, 155 U. S. 350, 39 L. ed. 182. And see *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 445, 21 L. ed. 675; *Clark v. Dyer*, 81 Tex. 339; *Louisville, N. A. & C. R. Co. v. Cavble*, 46 Ind. 277; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 26 Fed. Rep. 12; *Missouri P. R. Co. v. Humes*, 115 U. S. 572, 29 L. ed. 463.

¹ *Erwin v. Davenport*, 9 Heisk. 44, but he is not personally liable for negligence of his employees, as a general rule. *Ryan v. Hays*, 62 Tex. 42; *Davis v. Duncan*, 19 Fed. Rep. 477; *Cardot v. Barney*, 68 N. Y. 281.

² *Blumenthal v. Brainard*, 88 Vt. 402; *Paige v. Smith*, 99 Mass. 395; *Kain v. Smith*, 80 N. Y. 458.

³ A receiver exercising the franchises of a road under the direction of court is responsible officially for the negligence of his servants. *Meara v. Holbrook*, 20 Ohio St. 187; *Klein v. Jewett*, 26 N. J. Eq. 474; *Potter v. Bunnell*, 20 Ohio St. 150; *Cowdrey v. Galveston, H. & H. R. Co.* 93 U. S. 352, 23 L. ed. 950; *Winbourn's Case*, 30 Fed. Rep. 167; *Pope's Case*, 30 Fed. Rep. 169; *Brown v. Wabash R. Co.* 96 Ill. 297; *Little v. Dusenberry*, 46 N. J. L. 614; *Brown v. Brown*, 71 Tex. 355; *Melendy v. Barbour*, 78 Va. 544.

tract existing at the time of his appointment where the corporation could not have been compelled to perform it.' 'The mere fact that a leased line, forming part of a unit system covered by a mortgage, does not pay expenses, is not sufficient justification for the receiver to disaffirm the lease as to such branch line.'

§ 286. Effect of discharge as to liability.

The liability of the receiver being official in its nature, and not personal, it follows that no action can be maintained against him after he has been discharged growing out of personal injuries occasioned by the negligence of his agents and employees, nor will a suit pending against him at the time of his discharge be continued against him.' And where injuries have been sustained

¹ A receiver appointed to conduct the business of a corporation pending an action may refuse to perform a contract which was still executory at the time of his appointment, and the specific performance of which could not have been enforced against the corporation; and such refusal does not give liability under the contract a preference over executed contracts. *Scott v. Rainier Power & R. Co.* 18 Wash. 108.

Refusal of the receivers of a railroad company to carry out a contract by the company for the purchase of steel rails to be delivered at a specified time will not authorize the seller to maintain an action for breach of the contract, where the latter, before such refusal, has so delayed its preparations for performance that it could not have the rails ready for delivery at the time specified. *Diamond State Iron Co. v. San Antonio & A. P. R. Co.* (Tex. Civ. App.) 38 S. W. 987.

² Receivers of a branch railroad will not be permitted to disaffirm leases of feeding roads where a mortgage upon all the property, including the leased lines, contemplates that it shall be operated as a unit, although such lines do not pay expenses. *Mercantile*

Trust Co. v. St. Louis & S. F. R. Co. 71 Fed. Rep. 601.

Receivers of a railroad company will be directed to carry out a contract with a coal and iron company under which the latter conveyed to the railroad company a branch road in consideration of a stipulation on the part of the latter to pay the earnings of such branch to the former until the cost should be reimbursed in full. *Fidelity Ins. T. & S. D. Co. v. Norfolk & W. R. Co.* 72 Fed. Rep. 704.

³ In *Ryan v. Hays*, 62 Tex. 42, a receiver was appointed by a court of competent jurisdiction on the application of bond-holding creditors, and invested with exclusive authority to manage and carry on the business of the road as a common carrier, subject to the supervision of the court, and with all the rights and franchises of the corporation. A sale was made of the mortgaged property and a deed executed to the purchasers. Subsequently the purchasers of the railroad property conveyed the same back to the original company, and its board of directors passed a resolution accepting from the receiver the property and all money in his hands and assumed all debts and liabilities

against him as receiver. The receiver was finally discharged, but before such discharge suit was brought against the receiver and railroad company to recover damages for injuries inflicted on the plaintiff through the negligence of the receiver and his agents while in his exclusive charge. Held (1) that the receiver was not liable after all the property once in his control as receiver had been turned over to the purchasers and after he had received his discharge. (2) That his liability, being an official one, ceased at his discharge, except where he was personally at fault. (3) That the relation of master and servant does not technically exist between a railroad company and a receiver when the company's property is placed in his possession by the proper court. (4) While this is true, the profits or income of the property while in the hands of the receiver are responsible for the satisfaction of claims for injuries resulting from the negligence of the receiver or his employees. (5) The railroad company was not responsible for damages sustained by plaintiff through the negligence of the servants of the receiver further than its current receipts while in his hands, and the company, on the discharge of the receiver, would not be responsible merely by reason of their purchase from those who bought at the receiver's sale. See also *Hicks v. International & G. N. R. Co.* 62 Tex. 38; *International & G. N. R. Co. v. Ormond*, 62 Tex. 274.

In *Brown v. Gay*, 76 Tex. 444, it is held that the sole liability of a receiver, except in cases where he is personally at fault, is official, and a discharge of the receiver and return of the property to the owner would render a judgment against him for injuries fruitless. See also *Texas P.*

R. Co. v. Johnson, 76 Tex. 421; *Boggs v. Brown*, 82 Tex. 41; *Texas P. R. Co. v. Overheiser*, 76 Tex. 437; *Texas P. R. Co. v. Griffin*, 76 Tex. 441; *Texas & P. R. Co. v. Geiger*, 79 Tex. 18; *Texas & P. R. Co. v. Miller*, 79 Tex. 81, 11 L. R. A. 395; *Texas & P. R. Co. v. Comstock*, 83 Tex. 537; *Texas & P. R. Co. v. Adams*, 78 Tex. 372.

In *Farmers' Loan & T. Co. v. Central R. Co.* 7 Fed. Rep. 537, it is held that no action can be sustained against the receiver of a railroad company after his discharge and the transfer of the property to a purchaser under an order of court in a foreclosure proceeding.

In *Farmers' Loan & T. Co. v. Central R. Co.* 17 Fed. Rep. 758, it is held that where a receiver is discharged and the sale of the property confirmed with a provision in the order of confirmation that the purchaser shall pay all debts of the receiver and all claims and liabilities pending in the foreclosure case, the purchaser at such sale cannot be permitted, after accepting the property, to question the validity of the order, and it is the proper exercise of the chancery power of the court on surrendering the trust property to the purchaser to retain jurisdiction of the original case and enforce the payment of the debts and liabilities incurred by the receiver while operating the railway.

In *Davis v. Duncan*, 19 Fed. Rep. 477, it is held that a receiver is not personally liable for the torts of his employees, and only when he commits the wrong himself is he personally liable; that proceedings against a receiver for the torts of his employees is in the nature of a proceeding *in rem* and renders the property held by the receiver liable in compensation for such injuries; that the railroad company is not liable for injuries inflicted by a receiver or his servants

by a person through the negligence of the receiver's agents or employees, and the receiver has been discharged and the property restored to the company, the company in such case becomes liable for the damage resulting from such injury if during the receivership the current receipts have been applied towards betterments or permanent improvement of the road, at least to the extent of such diversion.¹ And in case the property of the company has

while its property was in the hands of a receiver and when it was out of possession, having no control over it.

In *Brown v. Wabash R. Co.* 96 Ill. 297, it was provided in the deed of sale "that said estate and interest are hereby charged with and shall pass by virtue of these presents subject to the payment of all liabilities incurred in respect to the said railroad or its business by said receiver." Held that the purchase under the deed was subject for the payment of such liabilities as the receiver had incurred while he had possession of the road. And it seems, in such a case, if a receiver is liable for the personal injuries arising from the negligent management of a road the party injured or his representative must first sue at law and settle the question of the receiver's liability and the amount of damages, and then file his bill against the grantee company; that a bill in equity will not be maintained in the first instance.

In *Sloan v. Central Iowa R. Co.* 62 Iowa, 728, it is held under §§ 1278 and 1307 of the Code that the property in the hands of a receiver is liable for the claim of an employee for injuries received through the negligence of coemployees.

In *Schmid v. New York, L. E. & W. R. Co.* 82 Hun, 385, the railroad property was sold under an order of foreclosure to certain parties, as trustees, subject to all lawful indebtedness of the receiver, made or incurred by him during his receivership, which indebted-

ness was made a lien upon the premises prior to the lien of the mortgages. Subsequently the purchasers conveyed the property to the defendant company, also making the conveyance subject to the debts and liabilities, after which the receiver was discharged. It was held that the plaintiff could maintain an action against the grantee of the purchaser to recover the amount of her judgment, or to have the same declared a lien upon the property so sold and satisfied by the sale thereof. See also *Pennsylvania Finance Co. v. Charleston, O. & C. R. Co.* 46 Fed. Rep. 508.

¹ *Texas & P. R. Co. v. Huffman*, 88 Tex. 286. In this case it is held that a railroad company is not liable for the negligence of its receivers, *ipso facto*, but where it is alleged and proved on trial that the earnings of the road while in the hands of a receiver had been invested in betterments of the property and then turned over to the company, the company is responsible, on the ground that it has received the benefit of the fund which was primarily liable for the damages occasioned by the act of the receiver. *Texas P. R. Co. v. Johnson*, 76 Tex. 421; *Texas P. R. Co. v. Griffin*, 76 Tex. 441; *Mobile & O. R. Co. v. Davis*, 62 Miss. 271.

A railroad company cannot be held liable for breach of a receiver's contracts or his torts, by mere proof that upon his discharge it received the property from him, in the absence of

been sold under a foreclosure proceeding and the purchaser at such sale has assumed all the receiver's liabilities, or the purchase is made subject to the liabilities against the property, the purchaser becomes liable therefor, and the person entitled to damages may recover the same in an action at law against the purchaser,¹ or the court making the foreclosure, if it retains jurisdiction for that purpose, may enforce the payment against the purchaser.* As we have elsewhere seen, the court will not permit the receiver

evidence of betterments to the road from the net earnings realized by the receiver. *Missouri, K. & T. R. Co. v. McFadden* (Tex.) 33 S.W. 853.

Failure to assert a claim against a railroad company while the property is in the hands of a receiver, and the presentation of another claim by the same claimant, which is paid, do not estop him to assert such claim after the property is turned over to the corporation by the receiver without a sale. *Diamond State Iron Co. v. San Antonio & A. P. R. Co.* (Tex. Civ. App.) 33 S.W. 987.

¹In *Farmers' Loan & T. Co. v. Central R. Co.* 17 Fed. Rep. 758, the claims for damages were filed in the foreclosure proceeding, pursuant to the terms of the order of court, and under the statute of Iowa the claims were entitled to a lien upon the railroad for the amount of damages from the time of recovering judgment. The receiver was not personally liable, but the property in his hands was liable and could be reached by suit in form against the receiver.

In *Schmid v. New York, L. E. & W. R. Co.* 33 Hun, 335, the action was brought by the plaintiff against the receiver and a judgment recovered against him. Subsequently, plaintiff's judgment not being paid, an action was brought for the amount of the claim, claiming a lien on the property sold by the receiver. See also *Ryan v. Hays*, 63

Tex. 42; *Hicks v. International & G. N. R. Co.* 62 Tex. 38; *International & G. N. R. Co. v. Ormond*, 62 Tex. 275. But see *Ohio & M. R. Co. v. Nickless*, 78 Ind. 383.

In *Brown v. Wabash R. Co.* 96 Ill. 297, a bill in equity was brought by Brown as administrator against the railway company on account of an accident occurring while the railway was in the hands of the receiver. The basis of the action was to recover in an action of equity unliquidated damages for personal injury, and it was held that there being a remedy at law the court would not take jurisdiction. The court say: "A court of chancery is not a forum in which the question of damages should be settled; if it was, the sacred right of trial by jury could easily be abrogated and set aside by merely resorting to such a tribunal."

A purchaser of a railroad is liable for damages caused by negligence of a receiver if the betterments upon the road by the receiver subsequent to the sale, and the earnings turned over to the purchaser, exceeded in value the liabilities imposed upon the purchaser by the decree of the court and the operating expenses of the receiver and claims for damages against him. *Houston & T. O. R. Co. v. Kelly* (Tex. Civ. App.) 35 S.W. 878.

¹*Farmers' Loan & T. Co. v. Central R. Co.* 17 Fed. Rep. 758.

to be sued without its permission first obtained,¹ except in actions in the Federal court, where by act of Congress the rule has been changed.²

¹ *Palys v. Jewett*, 82 N. J. Eq. 802; *Melendy v. Barbour*, 78 Va. 544.

In *Kinney v. Crocker*, 18 Wis. 74, it is held that the courts of Wisconsin have jurisdiction in actions for injuries against a receiver appointed by the United States court without leave to bring such action. *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Blumenthal v. Brainard*, 88 Vt. 402; *Lyman v. Central Vermont R. Co.* 59 Vt. 167; *Pacific R. Co. v. Wade*, 91 Cal. 449, 18 L. R. A. 754.

² In *Eddy v. Lafayette*, 49 Fed. Rep. 807, it is held that the act of March 3, 1887, was intended to place receivers of railroad companies upon the same plane with the railroad companies, both as respects their liability to be sued for acts done while operating the road, and as respects the mode of service of process.

In *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. Rep. 523, it is held that the Judiciary Act of 1887 and 1888 is not restricted to the courts having jurisdiction of the receiver and the property or to the Federal courts generally, but extends to any court of competent jurisdiction, and the appointing court has no power to enjoin the bringing of such suits in any other than the Federal courts. See *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 38 L. ed. 81. See also *Dillingham v. Russell*, 78 Tex. 47, 3 L. R. A. 634; *Southern P. R. Co. v. Maddox*, 75 Tex. 300; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Kinney v. Crocker*, 18 Wis. 75; *Melendy v. Barbour*, 78 Va. 544.

In *Central Trust Co. v. St. Louis, A. & T. R. Co.* 40 Fed. Rep. 426, it is held that where receivers of a railroad

running through Arkansas, and who were appointed in that case, had removed into another state, the court would authorize them to be sued in the state of Arkansas by service on their station agents or clerks therein. Prior to the Act of Congress it had been the rule in the state courts of Arkansas to permit a receiver of a railroad to be sued without special leave of court.

In *Missouri P. R. Co. v. Texas P. R. Co.* 41 Fed. Rep. 811, it is held that a judgment rendered in an action in a state court against a receiver appointed in an action in the circuit court instituted prior to the passage of the judiciary act of March 3, 1887, and which had been brought without the consent of the court appointing such receiver was not conclusive as to him but was subject to the equity jurisdiction of the court appointing him.

In *Central Trust Co. v. St. Louis, A. & T. R. Co.* 41 Fed. Rep. 551, it is held that when a state court has jurisdiction of the parties and the subject matter their judgment against the receiver of a Federal court is as final and conclusive as it is against any other suitor; that it is not within the jurisdiction of the United States circuit court to annul, vacate, or modify the judgment of state courts, and this rule is not affected by the last clause of the 3rd section of the Act of Congress of August 13, 1888 (25 Stat. at L. 436).

A receiver of a railroad appointed by a Federal court is not entitled under the Act of March 3, 1887, chap. 373, § 3 (24 Stat. at L. 552-554), to immunity from suit for acts done by his predecessor without previous permis-

§ 287. Receivers' certificates.

The principles involved in the matter of receivers' certificates have been so fully considered elsewhere that but a passing notice will be given the subject in this connection. A few general rules relating to it may be stated as follows:

(a) These certificates are issued under the authority and direction of the court and are evidences of indebtedness entitling the holder to receive from the receivership funds the amount specified therein if the fund is sufficient for such purpose, and, if not, a *pro rata* share with other holders of certificates.

(b) They have not the element of negotiability that ordinarily attaches to commercial paper, and are subject to all the equities existing against the payees, notwithstanding the assignment thereof.¹

(c) The holder takes this class of paper with notice of the authority and purposes for which it is issued, and that it is payable solely from the funds of the receivership, and that there is

sion given by that court, affirming same case in *McNulta v. Lockridge*, 187 Ill. 270.

In *Texas & P. R. Co. v. Cox*, 145 U. S. 598, 36 L. ed. 829, it is held that the proviso in § 6 of the Act of March 3, 1887, does not limit the operation of § 3 of that Act as corrected by the Act of August 18, 1888, and the circuit court of the United States may take jurisdiction of an action against the receiver or manager of the property appointed by it without previous leave obtained, although the action is commenced, before the enactment of the statute. The court say: "As jurisdiction without leave is maintainable through the Act of Congress, and as the receivers become such by reason of and derive their authority from and operate the road in obedience to the orders of the circuit court in the exercise of its judicial powers, we hold the jurisdiction existed because the suit was one arising under the

Constitution and laws of the United States, and this is in harmony with previous decisions." *Buck v. Colbath*, 70 U. S. 3 Wall. 384, 18 L. ed. 257; *Feibelman v. Packard*, 109 U. S. 421, 27 L. ed. 984; *Bock v. Perkins*, 139 U. S. 628, 35 L. ed. 814.

¹*Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 29 L. ed. 963; *Turner v. Peoria & S. R. Co.* 95 Ill. 184. Receivers' certificates, being merely evidences of indebtedness, have no higher character than the debts which they represent. *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. Rep. 372.

The doctrine that claims furnished to a railroad corporation before the appointment of receivers may have a preference over the lien of a mortgage does not apply to mining or manufacturing companies. *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co. supra.*

no responsible principal back of them to be made liable in case of default.¹

(d) In case of private corporations such certificates are not as a rule made preferential to existing liens, but may be made so in case of public corporations, such as railways.²

¹ *Bank of Montreal v. Chicago, C. & W. R. Co.* 48 Iowa, 518; *Stanton v. Alabama & C. R. Co.* 2 Woods, 506; *Wesson v. Chapman*, 77 Hun, 144; *Newbold v. Peoria & S. R. Co.* 5 Ill. App. 367; *Mercantile Trust Co. v. Kanawha & O. R. Co.* 50 Fed. Rep. 874; *Turner v. Peoria & S. R. Co.* 95 Ill. 134.

Certificates issued without authority are invalid and of no effect. *Stanton v. Alabama & C. R. Co.* 31 Fed. Rep. 585.

The holder is put upon inquiry as to what has been done in the litigation in which the certificates are issued, and is charged with notice of subsequent proceedings therein. *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 29 L. ed. 963.

² *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* 50 Fed. Rep. 481, 16 L. R. A. 603; *Kennedy v. St. Paul & P. R. Co.* 2 Dill. 448; *Bound v. South Carolina R. Co.* 50 Fed. Rep. 312; *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 136; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Barton v. Barbours*, 104 U. S. 136, 26 L. ed. 672; *Miltnerberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 29 L. ed. 963; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596; *Wood v. Guarantees Trust & S. D. Co.* 128 U. S. 421, 32 L. ed. 473; *Kneeland v. American Loan & T. Co.* 138 U. S. 89, 34 L. ed. 379; *Morgan's Louisiana & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625;

Kneeland v. Luce, 141 U. S. 491, 35 L. ed. 830.

When a railroad and mineral property are dependent for their value, both may be charged by certificates, pending a creditors' suit, to obtain money to reconstruct a bridge, and such certificates may be made a prior lien. *Karn v. Rorer Iron Co.* 86 Va. 754.

Receivers' certificates issued to a promoter of a corporation for money advanced to pay for improvements put on the corporate property will not be given priority over the rights of the seller of the property, who waived his lien upon the fraudulent guaranty by another promoter at the time of the sale that money was in his possession which would be applied to pay for such improvements. *Hooper v. Central Trust Co.* (Md.) 29 L. R. A. 262.

Where the receiver of a railroad company was directed to issue certificates to pay specific expenses incurred by his predecessor, and to be payable to the persons to whom delivered or order,—Held, that the holder of one issued to S, or bearer, and negotiated by mere delivery, would take subject to all equitable defenses against the payee, and the printed order of the court on the back was notice to him that it was made payable to bearer contrary thereto. *Turner v. Peoria & S. R. Co.* 95 Ill. 134.

First mortgage bondholders of a corporation, protesting against the issuance of receivers' certificates to

(e) It is an essential to the validity of such certificates that they shall be issued and delivered for the purposes authorized by the court.¹

(f) They are authorized with the greatest caution by the court and only when the necessity therefor is clear and their propriety not seriously questioned.²

pay for work to be done under a contract approved by the court and providing for payment in cash, or such certificates, are entitled to be heard as to whether such certificates should be issued. *Dorn v. Crank*, 96 Cal. 383.

Receivers' certificates issued under an order made after a decree of foreclosure and sale of property, which contain on their face a provision authorized by the order making them a lien on the property, will constitute a first lien thereon, if the order is not appealed from. *Ex parte Farmers' Loan & T. Co.* 129 U. S. 206, 32 L. ed. 656.

The power of court to authorize the issuance of receivers' certificates, and to make them a charge upon a railroad and its property superior to the lien of mortgages and statutory liens, is to be exercised with great caution, and when possible with consent or acquiescence of the parties interested in the funds. *Investment Co. v. Ohio & N. W. R. Co.* 36 Fed. Rep. 48.

The petition of a receiver of an insolvent railroad company to borrow money and issue certificates therefor, for the purpose of completing improvements already begun, will not be granted if it is doubtful whether the selling price of the road would be enhanced thereby except upon consent of the bondholders and lienholders interested. *Investment Co. v. Ohio & N. W. R. Co. supra*.

An order made upon the consent of some of the interested bondholders

and lienholders authorizing the receiver to borrow money and issue certificates for improvements, will not be made a charge upon the interest or affect the lien of nonconsenting parties, unless it is made clear to the court that the value of the road will be so increased by the improvements to such extent as to make it equitable to require them to pay their ratable proportion of the cost. *Investment Co. v. Ohio & N. W. R. Co. supra*.

A circuit judge may authorize the receiver of a railroad to issue his certificates to procure funds for the maintenance of the road, under S. C. Rev. Stat. § 2244, providing that such court shall always be open for the purpose of making all interlocutory orders preparatory to the hearing of all causes on their merits, and that any judge may make such order. *State v. Port Royal & A. R. Co.* (S. C.) 28 S. E. 863. Cf. *Bank of Montreal v. Chicago, O. & W. R. Co.* 48 Iowa, 518; *Coe v. New Jersey M. R. Co.* 27 N. J. Eq. 87; *Hoover v. Montclair & G. L. R. Co.* 29 N. J. Eq. 4; *Gibert v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 586; *Meyer v. Johnston*, 63 Ala. 237.

¹ *Stanton v. Alabama & C. R. Co.* 81 Fed. Rep. 585; *Union Trust Co. v. Chicago & L. H. R. Co.* 7 Fed. Rep. 513.

² *Meyer v. Johnston*, 63 Ala. 237; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 136; *Hoover v. Montclair*

(g) The court, having ordered the issuing of receiver's certificates, should see that the holders are protected by the final decree either by requiring the purchaser to assume their payment, or providing for their payment from the sale proceeds.¹

(h) A receiver, having deposited the money realized on the sale of certificates and checked against the same, is estopped from questioning the validity of certificates in the hands of an innocent purchaser.²

G. L. R. Co. 29 N. J. Eq. 4; *Smith v. McCullough*, 104 U. S. 25, 26 L. ed. 637; *Millenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Street v. Maryland C. R. Co.* 59 Fed. Rep. 25.

¹ Where a decree of sale provides for the payment of the undue principal of certain receivers' certificates and interest, it cannot be claimed by the purchaser that the lien for such principal and interest extends only to the amount originally paid to the receiver. *Central Nat. Bank v. Hazard*, 30 Fed. Rep. 484. Cf. *Mercantile Trust Co. v. Kanawha & O. R. Co.* 58 Fed. Rep. 6; *Wesson v. Chapman*, 76 Hun, 592.

The court, when it has authorized the issuance of certificates, with knowledge of all parties in interest,

will protect the holders thereof. *Humphreys v. Allen*, 101 Ill. 490; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 29 L. ed. 963; *Millenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Central Trust Co. v. Seaboard*, 130 U. S. 482, 32 L. ed. 985; *Kneeland v. Lucas*, 141 U. S. 491, 35 L. ed. 830; *Alabama Iron & R. Co. v. Anniston Loan & T. Co.* 57 Fed. Rep. 25; *Mercantile Trust Co. v. Kanawha & O. R. Co.* 58 Fed. Rep. 6; *Gordon v. Newman*, 62 Fed. Rep. 686; *Laughlin v. United States Rolling-Stock Co.* 64 Fed. Rep. 25; *Snow v. Winslow*, 54 Iowa, 200; *Langdon v. Vermont & C. R. Co.* 53 Vt. 228; *Stevens v. Union Trust Co.* 5 Hun, 498.

² *Alabama Iron & R. Co. v. Anniston Loan & T. Co.* 57 Fed. Rep. 25.

CHAPTER XV.

RECEIVERSHIP IN DECEDENTS' ESTATES.

- § 300. Pertaining to decedents' estates.
- (a) General.
 - (b) Contests over wills.
- § 301. As to executors and administrators.
- (a) When appointed.
 - (1) Violation of trust; waste, etc.
 - (2) Insolvency of executor; waste, etc.
 - (3) Removal from state.
 - (4) Death of; refusal to act.
 - (5) Property devised belonging to another.
 - (6) Misapplication of executor; fraud.
 - (7) No one competent to act.
 - (8) Contest between foreign and local administrator.
 - (9) Nonresident executor.
 - (10) Property in foreign country.
 - (b) When not appointed.
 - (1) Poverty of executor or administrator.
 - (2) Creditor's proceeding pending at death of testator.
 - (3) Application of surety on bond, etc.
 - (4) When defendant is solvent.
 - (5) When complaint not adequate.
 - (6) When misapplication not clearly shown.
 - (c) Misconduct and refusal to act.
 - (d) Where no one competent to act.
- (11) Bankruptcy of executor.
 - (12) Conversion of trust property by executor.
 - (13) In matter of fraud.
 - (14) Refusal to obey order of court. Illegal trust.

§ 300. Receivership in decedents' estates.

(a) GENERAL.

A court of chancery will not interfere in matters concerning the administration of an estate, and take the administration from those who by law are entitled to it, except in cases where there appears to be an urgent necessity in order to preserve and protect the property from injury and loss, or where there is no one legally competent to administer, or where those charged with the duty are violating the trust imposed in them by law. The reason for this rule is in the principle that where the law has created an office and charged the occupant with the duties appertaining thereto, no court will willingly step in and, through its officers, assume the functions of the legally constituted authorities, and particularly so where another court is given jurisdiction

to adequately and completely protect the interests of all parties concerned, as in the administration of estates. The probate courts, and those of similar jurisdiction, are usually clothed with ample and complete power in this regard.

(b) CONTESTS OVER WILLS.

Where there is a contest between parties interested in estate, growing out of the validity of a will, and a receiver has been appointed prior to the appointment of an administrator *pendente lite*, and the contest is likely to be protracted, it is proper to order the receiver to turn over to the administrator *pendente lite* the personal and real estate belonging to the testate. This is based upon the fact that the orphans' court appointing the administrator is the proper court for the adjudication of the matters in dispute, and the jurisdiction of the chancery court was temporary and for the purpose of preserving the property until such time as the proper court appointed a person with full power to protect and preserve the property.¹

Where an administrator of a life estate has been appointed and has partially administered the estate, a receiver will not be appointed, however proper it might have been to do so in the first instance.²

Where land has been devised to two persons under a will, and subsequent to the execution of the will, the testator conveyed part of the land to one of the legatees, who entered upon such land and operated the same as mining property, and it appears that there is danger of waste of the property, and the solvency of the legatee and grantee was doubtful, the court may appoint a receiver, it also appearing that the land was charged by the testator with the payment of debts. In such case, it appearing that the property over which a receiver was asked to be appointed was mining

¹A court of chancery cannot appoint a receiver after the granting of letters *pendente lite* by the orphan's court, and if such receiver has been appointed prior thereto, his powers cease after the grant, and he will be discharged and directed to deliver over the property to such administrator. *Re Colvin*, 3 Md. Ch. 278.

²Where an administrator for a life tenant has been appointed and has partially administered the trust estate, a receiver for such estate will not be appointed. *Shannon v. Davis*, 64 Miss. 717.

property and machinery for operating such mines, every beneficial and legitimate object will be attained by leaving the operations to go on as before, and requiring returns to be made to the appointee from time to time, and securing the same by bond, conditioned for the payment of the proceeds as ordered by the court.¹

§ 301. As to executors and administrators.

(a) WHEN APPOINTED.

As we have already seen in the case of testamentary trustees, the court will sometimes appoint a receiver of property in the hands of executors and administrators, but in all such cases there must be a strong case made out establishing immediate danger to the trust fund or property. This must, of necessity, be the rule for the reason that the wishes of the testator would be disregarded in case of executors or the orders of a court of co-ordinate jurisdiction be annulled in case of administrators. A receiver may be appointed in lieu of an administrator, or executor. (1) Where it is shown that the trust has been clearly violated, resulting in waste or misappropriation,² or that such a result is probable; (2) or that

¹ *Stith v. Jones*, 101 N. C. 360. This requirement is peculiarly applicable where the party in possession is a legatee under the will and also claims the property under a deed from the testator.

² *Harman v. Wagener*, 33 S. C. 487. In this case a suit was instituted by the executor for the sale of land and to marshal assets and to enjoin creditors from suing at law, in which general creditors intervened, and asked to have a receiver appointed on the ground that the executor was guilty of misconduct in his management of the estate, and was not a safe custodian thereof and was insolvent. It was also held that the judgment and execution returned in such case was unnecessary, for the reason that the principle has no application in a suit to marshal assets, or in a suit to com-

pel an administrator or executor to account. Cf. *Pelzer v. Hughes*, 27 S. C. 408; *Austin v. Morris*, 28 S. C. 408. In *Middleton v. Dodswell*, 18 Ves. Jr. 266, Lord Erskine said: "But if a manifest abuse of the trust by wasting the property appears, which does appear in this instance, not from a single act but an habitual and prospective course of dealing, bringing the property into danger, can it be said that this court is not to treat an executor as any other trustee? And an executor may say that unless he is proved to be insolvent, the court is to overlook the misapplication and refuse a receiver." In this case the application was before answer. The marriage of an executrix to a second husband in necessitous circumstances where there were infant children by the first marriage was held sufficient

the executor is insolvent, and this fact is coupled with waste or misapplication;¹ (§) or his removal from the state and thus an

ground for the appointment of a receiver in *Dillon v. Lady Mount Cashell*, 4 Bro. P. C. 306; *Lake v. De Lambert*, 4 Ves. Jr. 593. In *Stairley v. Rabe*, McMull. Eq. 22, it appeared that the executrix had managed the estate judiciously, but subsequently married a second husband possessing no qualifications for the management of such an estate, but was young, of limited means, and without experience and with little aptitude for any occupation. Cf. *Jenkins v. Jenkins*, 1 Paige, 243; *Gildersleeve v. Lester*, 68 Hun, 532.

¹ *Price v. Price*, 23 N. J. Eq. 428, in this case the court found that there had been waste and misappropriation and a refusal to answer concerning the same. In *Duval v. Marshall*, 30 Ark. 230, it appeared that the administrator had hindered and embarrassed the collection of the debts of the estate. It was also held that the court having acquired jurisdiction to collect and hold the assets it would retain jurisdiction to settle the estate. Upon the question of insolvency of the executor the court in *Fairbairn v. Fisher*, 57 N. C. 390, said: "The mere poverty of the executor does not authorize the court against the will of the testator to remove him by placing a receiver in his place. There must be in addition some maladministration or some danger of loss from the misconduct or negligence of the executor for which he will not be able to answer by reason of his insolvency. That seems to be the well-settled rule. * * * The only pretext for a receiver as far as the case appears in these proceedings, is the misunderstanding between the two executors. But that is not sufficient of itself or in connec-

tion with the limited circumstances of the defendant." Nor will the fact that it appears that the executrix is a person of little or no fortune be sufficient in the absence of proof of mismanagement; nor is the fact of a dispute in another court concerning the probate sufficient. *Knight v. Duplessis*, 1 Ves. Sr. 324. In *Howard v. Papera*, 1 Madd. 142 (Am. ed. p. 86) the vice chancellor says: "No misapplication or abuse of trust is made out against this executrix, and it would be too much to take the administration of this testator's property out of her hands merely because she is poor, a circumstance known to her husband, the testator, when he appointed her executrix." Cf. *Gladdon v. Stoneman*, note to last case cited; *Jenkins v. Jenkins*, 1 Paige, 243; *Price v. Price*, 23 N. J. Eq. 428.

In *Anonymous*, 12 Ves. Jr. 4, the question before the court was upon the sole ground that the executrix had no property other than an annuity of £20 given her by the testator, and that therefore a receiver should be appointed, and Sir William Grant says: "There is no doubt that in several instances, as, if the executor has wasted the effects, or in other respects has misconducted himself, this court will interfere. But has the court ever taken the disposition out of the hands of the executor on account of his mean circumstances—for it comes to that? You must prove the unfitness of the person. In this case the only ground is that she is not a person of property. * * * If any misconduct, waste, or improper disposition of the assets were shown the court would instantly interfere." Cf. *Gray v. Gaither*, 74 N. C. 237. But if the as-

abandonment of the trust;¹ (4) or the death of the executor, or death of one and refusal of the other to act;² (5) or where a sale of property is necessary, the legal title to which was in the testator, and which he devised to an executor, but in which another person had an interest and equitable title;³ (6) or where judgment creditors allege fraud and misapplication by an executor and insolvency,⁴ or where he has given no security, and has mismanaged the estate, and is about to leave the country;⁵ (7) or where by reason of a contest in the court of probate there is no proper person to receive the estate;⁶ (8) or where a foreign administrator has

signee, upon his own petition, has been adjudged a bankrupt a receiver is proper, it not being within the power of his assignee in bankruptcy to have charge of the trust property. *Steele v. Cobham*, L. R. 1 Ch. App. 325; *Gladdon v. Stoneman*, 1 Madd. 143, note (Am. ed. p. 86). In a bill by a ward charging waste and insolvency on the part of an administrator, a receiver may be appointed. *Ware v. Ware*, 42 Ga. 408. In *Gray v. Gailther*, 74 N. C. 287, an executor converted his land and personal estate into notes and money, and the court held the estate to be insecure. It was also held that though the trustee was insolvent, if the testator knew of that fact it would not be ground for removal.

¹ *Ex parte Galluchat*, 1 Hill, Eq. 148. In this case the executor had removed to another state and the application was made by the *cestui que trust*.

² *Palmer v. Wright*, 10 Beav. 234. In this case it would seem that the power of the probate court to appoint a successor would afford ample relief. The Master of Rolls says: "Nothing, I think, can be more clear than when there are two trustees and executors, and one dies and the survivor refuses to act, the persons beneficially interested in the estate are entitled to the protection of the court and to a receiver."

³ *Marvine v. Drexel*, 68 Pa. 362. In this case Drexel, the trustee, died, ordering his executors to sell his real estate whenever they thought proper. There was an agreement as to the purchase of lands between Drexel in his lifetime and Marvine, and the former's executors and Marvine disagreeing in regard to the mode of selling, a receiver was appointed. This case was based upon the idea that a receiver would be disinterested and the executors were representatives of the estate only, and that the court, having obtained jurisdiction, would direct the sale in the interest of all parties.

⁴ *Ex parte Walker*, 25 Ala. 81; *Scott v. Becher*, 4 Price, Exch. Rep. 346.

⁵ *Chappell v. Akin*, 39 Ga. 177. The allegations of the bill in this case were that the executor was insolvent, unmarried, extravagant, engaged in no settled business, intending soon to move to Honduras, and was badly managing his own business, and threatened to sell the trust property.

⁶ *Rendall v. Rendall*, 1 Hare, 152. In *Wood v. Hutchings*, 2 Beav. 289, an appeal was pending in the privy council from the ecclesiastical court, and the power of the administrator *pendente lite* had been suspended by an inhibition from the appeal court and there was no one, pending the litigation, to care for the estate.

brought property of the estate within the jurisdiction of a court of chancery where there is a local administrator;¹ (9) or where the executor is a nonresident;² (10) or where the property is in a foreign country;³ (11) or where the executor has become a bankrupt;⁴ (12) or where the executor converts the trust property to his own use,⁵ the great advantage to be secured, however, through the instrumentality of this proceeding is preventive in its nature rather than to redress grievances that have already been committed;⁶ (13) or where fraud is charged;⁷ (14) or where the trustee has been ordered to pay money due from him on an alleged breach of trust,⁸ or where the bill is filed to wind up an

¹ *Hervey v. Fitzpatrick*, Kay, 421.

² *Jones v. Smith*, 10 Hare. 71. (No appearance of defendant and no written opinion.)

³ In *Cockburn v. Raphael*, 2 Sim. & S. 453, the application was made by the executor resident in England, and the court required resident sureties in England.

In order to justify a court in appointing a receiver to take property from an executor or administrator who has been appointed by the proper court under letters testamentary or of administration, it must be alleged in the bill or otherwise shown by affidavits or other competent evidence:

(1) That there is imminent danger to the estate; (2) that the probate court, or court exercising probate jurisdiction, has inadequate power to afford adequate relief; (3) that the allegations and charges are definite and specific, and not on information and belief; (4) that the executor or administrator is irresponsible, or his bond insufficient or inadequate.

A receiver in lieu of an executor or administrator may properly be appointed: (1) Where it is shown that a trust has been clearly violated and as a result serious waste and misappropriation has followed; (2) that the executor or administrator is insolvent

and this fact coupled with mismanagement and waste or misapplication; (3) on his removal from the state and thus abandoning the trust; or (4) in case of his death, or where there is, by reason, a contest over the right to administer and there is no one legally entitled to receive and care for the funds or property, pending the litigation.

⁴ *Steele v. Cobham*, L. R. 1 Ch. App. 825; *Langley v. Hawk*, 5 Madd. 46; *Gladdon v. Stoneman*, 1 Madd. 142 (Am. ed. p. 86 note). In the first case above cited the court held that the fact that the assignees were not before the court was not material.

⁵ In *Gray v. Gaither*, 74 N. C. 237, the court ordered the executor to give the bond for the protection of the assets and for the performance of the final decree and upon his failure to do so then a receiver should be appointed. There was no dereliction of duty on the part of the executor and the court held under such a state of facts it was error to appoint a receiver in the first instance.

⁶ *Perrin v. Lepper*, 56 Mich. 351; *Dougherty v. McDougald*, 10 Ga. 121.

⁷ *Vernon v. Kinzie*, 2 U. C. Jur. 40.

⁸ *Coney v. Bennett*, 54 L. J. Ch. 1130; *Leathes v. Leathes*, Weekly Notes, 1882, p. 71; *Whitley v. Learoyd*, 56 L. T. 846.

illegal trust,¹ or where it is necessary to prevent the transfer of property held in trust.²

(b) WHEN NOT APPOINTED.

The court will not appoint a receiver in lieu of an executor or administrator (1) where the only ground of complaint alleged is the poverty or financial irresponsibility of the person acting in this relationship;³ nor (2) in a creditor's proceeding where the bill was filed against the intestate debtor in his lifetime, and after his death revived against his administrator;⁴ nor where the alleged cause of complaint occurred during the lifetime of the intestate, and where there is no allegation of mismanagement against the administrator;⁵ nor (3) on the application of a surety on the bond of the administrator, where the purpose is to require the administrator to secure the bondsman on account of his liability for his principal;⁶ nor (4) where the defendant is perfectly solvent, and where he offers to secure the plaintiff in whatever

¹ *Cameron v. Havemeyer*, 25 Abb. N. C. 438.

² *Lutt v. Grimont*, 17 Ill. App. 308.

³ In *Fairbairn v. Fisher*, 4 Jones Eq. 390, the court say: "There does not appear to be any change for the worse, at least in the property or credit of the executor, since the death of the testator or even the making of his will; the mere poverty of the executor does not authorize the court against the will of the testator to remove him by placing a receiver in his place. There must be in addition some maladministration, or some danger of loss from the misconduct or negligence of the executor, for which he will not be able to answer by reason of his insolvency." *Howard v. Papera*, 1 Madd. 142; *Gladdon v. Stoneman*, 1 Madd. 143, note; *Johns v. Johns*, 23 Ga. 81; *Anonymous*, 12 Ves. Jr. 4.

⁴ *Mathews v. Neilson*, 3 Edw. Ch. 346; *Sylvester v. Reed*, 3 Edw. Ch. 296. In these two cases it was held

that a creditor's bill could not be revived against the debtor's administrator where the purpose is to obtain the appointment of a receiver.

⁵ *Perrin v. Lepper*, 56 Mich. 351. There was no showing whatever that the property was being wasted by the complainant administrator, or that the estate was unsafe in his hands, and a receiver was refused.

⁶ *Delaney v. Tipton*, 3 Hayw. (Tenn.) 14. In this case Delaney, the surety on the administrator's bond, filed a bill and asked for an order on the administrator to give security to him, and in default of so doing that a receiver be appointed to take possession of the assets,—held, that the plaintiff was not entitled to the relief. Cf. *Walker v. Drew*, 20 Fla. 908, as to a surety of a deceased debtor and his right to have a receiver; and *Stenhouse v. Davis*, 83 N. C. 432, as to the right of a surety of a purchaser at an administrator's sale.

rights he may be entitled to on final hearing;¹ nor (5) where the acts of an executor complained of are not serious, and he has the confidence of the business men of the community;² nor (6) where the misapplication of the funds charged is not clearly shown.³

There must be a strong case made for the appointment in order to justify a court in interfering in the matter of trustees who have been appointed, or authorized to act under the orders of another court of competent jurisdiction, and especially so in the case of executors who are presumed to have been appointed by reason of some peculiar fitness or confidence reposed in them by the testator.⁴

¹ A receiver of a decedent's estate should not be appointed without giving a defendant, who is shown to be entitled to at least half the estate and to be perfectly solvent, an opportunity to give a sufficient bond to protect the petitioner in whatever rights he may be able to establish at the final hearing. *Bivins v. Marvin*, 96 Ga. 268.

² That one of the three executors of an estate without bond has been seen a few times playing cards for money is not sufficient cause for the appointment of a receiver pending an action by the heirs to recover their alleged interest in the estate, and for partition, where a large number of business and professional men in the community where such executor lives affirm his integrity of character and his entire fitness for the trust. *Harris v. Hicks* (Tex. Civ. App.) 84 S. W. 983.

³ The advance by the executors to the widow of less than half of the cash on hand, which was *prima facie* a community fund, does not authorize the appointment of a receiver pending an action by the heirs to recover their alleged interest in the estate, and for partition, upon the ground of misapplication of the funds and refusal to allow the plaintiffs free access to the books of deceased, where

the widow's interest in the estate is apparently largely in excess of the amount paid her, and she was otherwise without means of support. *Harris v. Hicks* (Tex. Civ. App.) 84 S. W. 983.

A receiver cannot be appointed in an action against a foreign executor as an individual to apply securities of the estate to redeem securities of a third person pledged for the testator's debt, as the executor in his individual capacity could not be compelled so to do. *Collins v. Stewart*, 2 App. Div. 271.

⁴ In *Shannon v. Davis*, 64 Miss. 717, it is held that where an administrator has been appointed and has partially administered the estate a receiver is improper, though it might have been proper to appoint in the first instance. In *Perrin v. Lepper*, 56 Mich. 351, it was held that in the absence of proof of waste on the part of the administrator, or danger to the estate, the appointment would not be made. Cooley, J., says: "Receivers are not appointed by way of punishment of parties, and especially of dead parties, for their misconduct." The court, however, will not hesitate where the administrator is seeking to administer property the title to which appears to be in another. *Hill v.*

(c) MISCONDUCT AND REFUSAL TO ACT.

Where an executor refuses to collect and account for a fund that was placed by his intestate's will in a firm for a definite period, and there is danger of its being lost by reason of such refusal, a receiver is proper, and the court has power to make the appointment. While courts are slow to appoint receivers to take property of an estate from the hands of an administrator who has been legally appointed, yet where the administrator is attempting to administer property the title to which appears to be in another, then in such case a receiver should be appointed if the circumstances indicate that the rights of all the parties would thereby be more effectually and expeditiously protected and enforced.¹

Arnold, 79 Ga. 367. Cf. *Stairley v. Rabe*, McMull. Eq. 22; *Middleton v. Dodswell*, 18 Ves. Jr. 68. And see *Rendall v. Rendall*, 1 Hare, 152, where the vice chancellor reviews the English doctrine upon this subject. And in *Haines v. Carpenter*, 1 Woods, 262, the court refused to entertain a bill to appoint a receiver upon the ground that the executor had qualified and given bond for the discharge of his trust and had taken possession of the estate under the provisions of the will of the testator, where the allegations were made on information and belief. The court say: "The property is *in gremio legis*; the jurisdiction of the parish court has attached to the assets; they are in the hands of a trustee who is required to account only to the court which appointed him, and this court has no power to take the assets from the possession of that trustee and compel him to account here." In *Wannaker v. Hitchcock*, 38 Fed. Rep. 383, it was held that where the probate court had full power to protect the interests of all parties a receiver would not be appointed. Cf. *Middleton v. Dodswell*, 13 Ves. Jr. 266; *Haines v. Carpenter*, *supra*.

On a creditor's bill, a decree was rendered establishing the claims of creditors and directing their payment out of such assets as may be applicable to them, by the administrator, and ordering the receiver to pay the claims out of the moneys and securities at their nominal amount which should come into his hands. Held, that the direction to the receiver to pay was subordinate to the right of the administrator to determine the applicability of the assets, and the receiver having paid out money to the agent of a creditor without the direction of the administrator, the court granted an injunction to restrain the moneys paid to such agent within the control of the court. *Green v. Hanberry*, 2 Brock. 403.

¹ Where an administrator is seeking to administer property, the title to which clearly appears to be in another, then a receiver should be appointed, if the circumstances indicate that the rights of all the parties would thereby be more effectually and expeditiously protected and enforced. *Hill v. Arnold*, 79 Ga. 367.

Where it appears that the conduct of an administrator is such as to hinder and delay the collection of the assets of an estate, a court of chancery has power, and it is its duty, to appoint an administrator to collect and hold the assets, and, having acquired jurisdiction for that purpose, it may retain it for the purpose of finally settling the estate.¹

If an executor of a will and legatee thereunder files a bill in the nature of a creditor's bill, enjoining creditors of the testate from suing him at law, such executor is a quasi trustee for the creditors, and on proper application a receiver may be appointed, where there is a misuse or misapplication or waste of the property, and there is danger of loss, and in such case, on the application of creditors, it is not incumbent to show that they have exhausted their legal remedies, the basis of their application being mismanagement. Where the application is based upon waste committed by the executor or administrator, the charge must be specific and designate the thing done which constitutes the waste complained of.²

A creditor may file a creditor's bill against the executor of a deceased debtor to make him account for the estate in his hands, without first having obtained a judgment at law and procured a return of execution *nulla bona*.³

But where an executor has qualified and given bond for the faithful discharge of his duties, and has taken possession of the property of the estate by virtue of the provisions of the will, a strong case must be made against him to induce the court to appoint a receiver and take from the executor the property of the estate; and in such case the charges of mismanagement must be positive and not on information and belief, and in addition to the proof of danger it must also appear that the executor in possession is irresponsible or his bond is insufficient.⁴

¹ Where it is shown that the executor is guilty of misconduct, and was not a safe custodian and was insolvent and the estate is insolvent, a receiver will be appointed. *Harmon v. Wagener*, 33 S. C. 487.

In such case it is not necessary to establish an exhaustion of legal remedies. *Harmon v. Wagener, supra*.

² *Sanders v. Christie*, 1 Grant Ch. (Ont.) 137.

³ *Harmon v. Wagener*, 33 S. C. 487.

⁴ Where an executor has qualified and given bond for the faithful discharge of his trust, and taken possession of the property of the estate by virtue of the provisions of the will, a strong case must be made against him

Where an administratrix is carrying on the business of her deceased husband, on the filing of a bill by the heirs of such deceased person alleging that the administratrix was not the widow of the deceased it is proper to appoint a receiver.¹ And where a bill is filed by a devisee to try the validity of a will as to real estate the court will, under special circumstances, appoint a receiver;² and so also where the executor is carrying on the business of the testator pursuant to his directions and it is shown that the

to induce the court to appoint a receiver to take the possession of the property from him. *Haines v. Carpenter*, 1 Woods, 262.

Cf. *Beverley v. Brooks*, 4 Gratt. 208; *Bainbridge v. Blair*, 4 L. J. Ch. N. S. 207; *Smith v. Smith*, 2 Younge & C. 861; *Middleton v. Dodswell*, 18 Ves. Jr. 286; *Haggarty v. Pittman*, 1 Paige, 298; *Burt v. Burt*, 41 N. Y. 46.

Willis v. Corlies, 2 Edw. Ch. 281. This was a case against trustees but the principle is applicable to executors and administrators as well. The vice chancellor says: "The court looks to the security and preservation of the property, and ought not to interfere pending the litigation when the plaintiff's right is not perfectly clear and the property itself, or the income arising from it, is not shown to be in danger; and it is acknowledged to be the rule in several of the English cases that there must be some evil actually existing, or some evidence of danger to the property or a strong special case of fraud in the defendant clearly proved to induce the court in this stage of the cause to take the property under its care. *Hugonin v. Basely*, 18 Ves. Jr. 105; *Middleton v. Dodswell*, 18 Ves. Jr. 286; *Lloyd v. Passingham*, 16 Ves. Jr. 69. In another case in the Irish chancery court it has been observed that such an interference is, to a certain extent, giving relief—in fact depriving defendants of a present use and enjoyment of the estate and, so far,

a decision *pro tempore* against them; and, therefore, without some strong necessity, the court ought not to do any act to disturb the existing possession until, from a view of the whole case and by a regular adjudication, it can pass upon the right." *Houlditch v. Lord Donegal*, 1 Beatty, 402. Speaking upon the general subject of the appointment of receivers, Lord Eldon in *Lloyd v. Passingham*, 16 Ves. Jr. 59, says the court must not only be satisfied of the existence of the fraud but must be morally sure that upon the hearing of the cause the party would, upon those circumstances, be turned out of possession, but it must see some danger to the intermediate rents and profits. Cf. *Olark v. Ridgely*, 1 Md. Ch. 70; *Randle v. Carter*, 62 Ala. 95; *Ex parte Walker*, 25 Ala. 81; *Hitchen v. Birks*, L. R. 10 Eq. 471.

To justify the appointment of a receiver to take the custody of assets in the hands of an executor or administrator there must be actual misconduct or fraud, and immediate danger of loss. *Randle v. Carter* and *Ex parte Walker*, *supra*.

¹ *Graham v. Graham*, 2 Vict. Rep. 145.

² *Middleton v. Sherburne*, 4 Younge & C. 358. But not in the absence of an allegation of the insolvency of those in possession of the land. *Bryan v. Moring*, 94 N. C. 694.

executor is insolvent, that there is sufficient property to pay the debt, and that the executor refuses to pay or use the assets for such purpose on application of a creditor,—under such a state of facts a receiver will be appointed;¹ but in the absence of proof of danger of loss and when the real and personal property are sufficient to pay the debts of the decedent, a receiver will not be appointed of the rents and profits of the real estate.²

(d) WHERE NO ONE COMPETENT TO ACT.

A receiver of the property of a decedent will be appointed by a court of equity if it appears from all the circumstances that there is no executor or administrator, and if there is imminent danger of the property of the decedent being taken from the state, leaving no other property liable to pay the creditors of the estate, and where the person in possession is insolvent or is a non-resident, but in such a case it is necessary that the plaintiff shall show (1) either a clear right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction, and (2) it must appear that the property was obtained by the defendant through fraud or that the property itself or the income from it is in danger of loss from negligence, waste, misconduct, or insolvency.³

The rule that a receiver will not be appointed to take property

¹ *Willis v. Sharp*, 46 Hun, 540. In this case the bill was filed by a creditor against an insolvent executor.

² Where it does not appear that real and personal property of the decedent will be insufficient to pay the decedent's debts, the court will not appoint a receiver of the rents and profits of the real estate. *McKaig v. James*, 66 Md. 588.

³ A receiver of the assets of a decedent will be appointed in equity if it appears from all the circumstances that there is no executor or administrator in existence, where there is imminent danger of the property of the decedent being taken from the state

leaving no other property liable to pay creditors, and the person in possession is insolvent or a nonresident. *Flagler v. Blunt*, 32 N. J. Eq. 518.

In such case it is essential that the plaintiff should show, first, either a clear legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction, and, secondly, it must appear that the property was obtained by the defendant through fraud, or that the property itself or the income from it is in danger of loss from negligence, waste, misconduct, or insolvency. *Flagler v. Blunt*, *supra*.

from an administrator duly appointed and in possession does not extend to a case where the property was fraudulently conveyed to the deceased in his lifetime.¹

¹ The rule that a receiver will not be appointed to take property from an administrator does not extend to a case where the property was fraudulently conveyed to the deceased. *Werborn v. Kahn*, 93 Ala. 201.

CHAPTER XVI.

RECEIVERSHIP OVER TRUST PROPERTY.

§ 305. General.

§ 306. Receiver in lieu of trustee.

(a) When appointed.

(1) In case of misappropriation.

(2) In case of fraud.

(3) Disobedience of orders of court.

(4) Illegal trusts.

(5) Where necessary to prevent transfer.

(6) Fraud not always necessary to be shown.

(7) Where purposes of trust have failed.

(8) Conflicting claimants; separate suits.

(9) Mixing of trust property.

(10) When continued.

(11) Claim against beneficiary.

(b) When not appointed.

(1) Failure of proof.

(2) Where money in hands of bailee.

(3) Where debt charged to trustee personally.

(4) Where trustee is statutory.

(5) Where trustee acts under marriage settlement.

(6) Where other parties interested than *cestui que trust*.

(7) Discretion of trustee.

§ 307. Fraudulent assignments.

§ 308. Testamentary trustees.

§ 309. Infants' estates.

§ 310. Lunatics' estates.

§ 305. General.

A court of equity is peculiarly qualified by reason of its remedial powers in affording relief to beneficiaries of trust property where the trustee is, by mismanagement of the estate or otherwise, endangering the trust fund or property in his possession. The trustee, in all cases, is required to exercise the greatest care and diligence in the preservation and management of the trust estate placed under his supervision. In many cases his duties are delicate, and not free from obligations of the most sacred fiduciary character, where the law requires strict fidelity and the utmost good faith, as in cases of express trusts where the donor himself has by his act imposed upon the trustee duties and obligations peculiarly exacting. Assuming duties of this character by the trustee in its very nature would dictate the most strict accountability on his part both in relation to the donor and donee, or *cestui que use*, and courts of equity have jealously guarded and protected the interests of all parties.

Receiverships, as applicable to trust property and trustees, usu-

ally occur in connection with express and implied trusts growing out of the relationship of executors and administrators, testamentary trusteeships, guardianships, committees of lunatics, and other fiduciary relationships created by statute, and by deeds and agreements of the parties. Courts of equity have at all times, owing to the peculiar nature of their remedies and their adaptability to trust relationships, been the special forum for relief in matters of this character, and the law of receivership has become interwoven with, and an element in, the general jurisprudence on the subject, though not to the same extent as in some other branches of equity jurisdiction for the reason that trustees of all kinds have been especially subject to the control and direction, restraint and guidance of courts of equity, and for the additional reason that trustees, as a rule, are selected by the party creating the trust, and therefore are presumed to have been placed in their positions for some special fitness and qualification, or by reason of some especial confidence reposed in them, which courts are extremely slow to interfere with.

§ 306. Receiver in lieu of trustee.

(a) WHEN APPOINTED.

In this class of cases the appointment of a receiver in lieu of a trustee rests in the sound judicial discretion of the court, as in the appointment of receivers generally.¹ As a general rule it may be stated that the court has power to appoint a receiver in lieu of a trustee:

(1) Where the trustee has misappropriated or lost the trust property;² or

(2) Where fraud is charged and shown;³ or

¹ *Janeway v. Green*, 16 Abb. Pr. 215, note.

² *Gildersleeve v. Lester*, 68 Hun, 532.

A special receiver of the assets of an insolvent firm, assigned to a trustee for the benefit of creditors, may be appointed and required to duly administer the same under the directions of a court of equity, where it is made to appear that such trustee is violating his duty to keep the trust property

distinct from his individual funds and safely deposit the same in some bank or other like place for safe-keeping, to the injury or great risk of injury to the beneficiaries, or that he is wasting or misappropriating such fund or a material part thereof, or that there is danger of such misappropriation.

Wagner v. Coen (W. Va.) 23 S. E. 735.

³ *Vernon v. Kinzie*, 2 U. C. Jur. 40.

(3) Where the trustee has failed to obey an order to pay over money due from him in respect to an alleged breach of trust;¹ or

(4) Where a bill is filed to wind up an illegal trust;² or

(5) Where it is necessary to prevent a transfer of property held in trust.³

(6) And it is not necessary in all cases to allege and prove fraud or misconduct on the part of the trustee, in order to secure the appointment of a receiver in trust matters. Thus, where coupon bonds or other property not ear-marked with the trust are placed in the hands of a *de facto* trustee or custodian, by the agreement of the *cestuis que trustent*, and they become dissatisfied and file a bill for accounting and distribution, and where there is protracted litigation between the parties in interest, and the trustee, though denying any danger to the trust fund, is anxious to be relieved from a troublesome and thankless duty, the court may appoint a receiver.⁴

(7) And where the purposes of a trust agreement have failed, a certificate holder in such trust has a right to demand that the affairs should be wound up, and his interest protected, and in such a case it is proper for the court to appoint a receiver, upon the application of the certificate holder, although the property may be in the hands of parties of the highest standing for business capacity and integrity of character.⁵

(8) Where there are conflicting claimants of a trust fund who are prosecuting separate suits in the same court, and a receiver is appointed in one suit, his appointment will inure to the benefit of the plaintiff in the other suit, if upon the adjudication it is ascer-

¹ *Coney v. Bennett*, 54 L. J. Ch. 1180; *Leathes v. Leathes*, Weekly Notes, 1883, 71; *Whitley v. Learoyd*, 56 L. T. 846.

² *Cameron v. Havemeyer*, 25 Abb. N. C. 488.

³ *Lutt v. Grimont*, 17 Ill. App. 808.

⁴ *Fidelity Ins. & T. Co. v. Huber*, 13 Phila. 52.

⁵ *Cameron v. Havemeyer*, 25 Abb. N. C. 488 (451). In this case the court had declared the trust agreement void as creating a vast monopoly, and so against public policy. The court say:

"I cannot, therefore, but think such a course is not only demanded by law but it is to the best interest of all concerned,—for the public, because it will free the corporations composing the trust from their illegal relations with it * * * ; for the certificate holders, because it will preserve the property and facilitate the speedy settlement of the matter, either by a reorganization, if practicable, or a division of the property."

tained that the plaintiff in the latter suit has a superior right to the trust fund.¹

(9) If the trustee mixes the property with his own it is not sufficient ground for the appointment of a receiver, in the absence of further proof of danger resulting from such act.²

Where property is conveyed to a trustee for the benefit of the grantor's wife, and at her death in trust for her children, with power to rent or sell, in the discretion of the trustee, on a bill filed by the infant *cestuis que trustent* for the removal of the trustee and for a receiver, the court will not, in the absence of proof of an abuse of discretion, appoint a receiver.

(10) When a receiver of trust property has been appointed, it is proper for the court to continue him on the expiration of the trust, if the persons who are entitled to the possession as tenants in common disagree among themselves, and there is no prospect that they can act harmoniously.³

(11) In a suit to compel a trustee to account for a trust fund which he should pay over to the beneficiary, but which he retains because of an alleged claim against the beneficiary for a breach of contract, a receiver may be properly appointed.⁴

¹ *Beverley v. Brooke*, 4 Gratt. 187.

For a case in which the allegations of the bill were held insufficient to warrant the court in taking property from the hands of trustees and placing it in the custody of a receiver, see *Pyles v. Riverside Furniture Co.* 30 W. Va. 123 (145).

² *Orphan Asylum v. McCartee*, Hopk. Ch. 429. In this case a bill was filed by a legatee under a will against trustees to obtain the benefit of the devise, and also for the appointment of a receiver. The court held that the question of the legality of the devise was resting in *equilibrio*, and could not be considered in the motion; that the mixing of the trust funds with his own was of itself no ground for the appointment; that in the absence of danger this was no breach of duty; and that there was no case in which the court appointed a receiver merely

because the measure could do no harm, and still less where the trustee was such under the appointment of a testator. In a case where the trust fund is not in danger, the court will refuse to appoint. *Richards v. Barrett*, 5 Ill. App. 510. It is the peril of the trust fund alone that moves a court to dispossess a trustee from the exercise of his legal rights over the trust fund, and unless such peril is shown by specific allegations, supported by clear proof, the court will not interfere. *Fort Payne Furnace Co. v. Fort Payne Coal & I. Co.* 96 Ala. 472; *Sims v. Adams*, 78 Ala. 395; *Simmons Hardware Co. v. Waibel*, 1 S. D. 488, 11 L. R. A. 267; *Phelan v. Eaton*, 3 Vict. Rep. 13.

³ *Ball v. Tompkins*, 41 Fed. Rep. 486.

⁴ *Hagenbeck v. Hagenbeck Zoological Arena Co.* 59 Fed. Rep. 14.

(b) WHEN NOT APPOINTED.

The court will not interfere on application to have a receiver appointed for a trust estate while chancery proceedings are pending for the removal of a trustee, (1) unless a very strong case is made out;¹ nor (2) where money due a judgment debtor is in the hands of a bailee;² nor (3) where complainant's debt had at first been charged against the trustee individually and not as trustee, even if the trustee is personally insolvent;³ nor (4) in case of a foreign corporation, where its property is in the hands of trustees appointed under the statutes of a foreign state;⁴ nor (5) where property is in the hands of a trustee for husband and wife, under the terms of a marriage settlement;⁵ nor (6) where a contract is held by a trustee for the benefit of several persons, on the application of a *cestui que trust*, having but a small interest in the profits, where the appointment would operate to deprive the contractors of money sufficient to perform the contract, and the trustee is pecuniarily responsible and not guilty of a breach of duty involving moral turpitude.⁶

(7) Where trustees have a discretion in regard to the doing or not doing of a particular thing, as in the payment of interest, it is improper for the court to make an order which will take from the trustees this discretion. Thus, where trustees under a will were directed to set apart and invest a sum of money, and were authorized in their absolute discretion from time to time, and at such time or times as they should think proper, to pay or apply the whole or any part of the income to or for the benefit of the judgment debtor, in such a manner and in all respects as they should think proper, the money will not be ordered paid to the receiver.⁷

§ 307. Fraudulent assignments.

The appointment of a receiver in equitable proceedings instituted for the purpose of setting aside assignments made for the benefit of creditors where fraud is alleged and shown in the

¹ *Poythress v. Poythress*, 16 Ga. 406.² *Morris v. Taylor*, 32 L. R. Ir. 14.³ *Hatcher v. Massey*, 66 Ga. 66.⁴ *Fenton v. Lumdermans' Bank*, 1 Clarke, Ch. 286.⁵ *Whitaker v. Cohen*, 69 L. T. 451.⁶ *Deolin v. Hope*, 16 Abb. Pr. 314.⁷ *Queen v. Lincolnshire & Dixon County Judge*, L. R. 20 Q. B. Div. 167.

transaction, is frequent, but in such case there must be proof of insolvency of the assignee and such a state of facts shown as renders it probable that the property will be disposed of in fraud of creditors' rights,¹ but if it be shown that the assignee is solvent and the fraud is denied by the answer a receiver will not be appointed pending the litigation.² This doctrine is based upon the principle already stated that courts are, at best, slow to interfere with the possession of a trustee apparently in the lawful custody of property charged with a trust, in a matter of assignment recognized by law, and where the assignor has a right to dispose of his property in such manner as shall seem to him best, subject only to the rights of bona fide creditors therein.

§ 308. Testamentary trustees.

There are many cases in which a receiver will be appointed to take the place of trustees appointed under a will, as where some of the trustees refuse to act and all the parties are before the court consenting to the appointment;³ or where some of the trustees are dead, and the others refuse to act;⁴ or where the trustee becomes insolvent, and misapplies the property or its proceeds, or otherwise diverts the income or appropriates the same to his own use;⁵ or suffers leasehold property to become forfeited

¹*Ellett v. Newman*, 92 N. C. 519. In this case an action was brought to set aside an assignment alleged to be fraudulent and void as to creditors when it appeared that there was reasonable ground to apprehend that the goods involved in the action might be disposed of fraudulently before the case could be tried upon its merits, and thus render a judgment ineffectual. The court say: "The authority of the court to preserve property, the subject of litigation, pending the action, until final judgment, and then to apply it as justice may require, is too manifest to admit of question, and such authority should be exercised when it appears that there is reasonable ground to believe that the plaintiff may recover, and the inter-

ference of the court is necessary to protect the property in question pending the controversy." Citing *Parker v. Grammer*, Phill. Eq. 28; *Craycroft v. Morehead*, 67 N. C. 422; *Morris v. Willard*, 84 N. C. 293; *Levenson v. Elson*, 88 N. C. 182.

²*Levenson v. Elson*, *supra*.

³*Brodie v. Barry*, 3 Meriv. 695, citing *Beaumont v. Beaumont*, not reported.

⁴*McCasker v. Brady*, 1 Barb. Ch. 329. This was a bill for partition, alleging the invalidity of a will, where one trustee died and the other two refused to act. Cf. *King v. Donnelly*, 5 Paige, 46.

⁵See *Albright v. Albright*, 91 N. C. 230, where the testator conveys his property and retains nothing subject to

for nonrepair of the premises;¹ or where a trustee fails to pay money due from him pursuant to an order of court;² or loans the trust funds contrary to the express conditions of the trust instrument;³ or withholds the trust funds from those entitled thereto.⁴ In all cases, however, the appointment of a receiver rests in the sound judicial discretion of the court, under all the circumstances of the case.⁵

§ 309. Infants' estates.

As early as 1727, the Parliament of England, sitting as a court of appeals, held that where a testator by will named his widow as guardian of his minor children it was beyond the power of the

execution. *Ladd v. Harvey*, 21 N. H. 514. See *Malone v. Buice*, 60 Ga. 152, as to insolvency. But the mixing of the funds with his own in the absence of danger is not sufficient. *Orphan Asylum v. McCartee*, Hopk. Ch. 429.

¹*Re Fowler*, L. R. 16 Ch. Div. 723. "It is made the duty," says the chancellor, "of trustees of leasehold property to keep it free from forfeiture out of the rents, if no other fund is applicable."

²*Re Coney*, L. R. 29 Ch. Div. 993. In this case the trustee had absconded; and it was decided upon the authority of *Leathes v. Leathes*, Weekly Notes, 1882, p. 71, and based as to general power under the Judicature Act of 1873, § 25, subs. 8.

³*North Carolina R. Co. v. Wilson*, 81 N. C. 223. In this case the trustee loaned part of the funds to a firm of which he was a member, which subsequently failed; and it was held that the trustee's insolvency and unsuccessful management of his own business might be considered in passing upon the question.

⁴*Hagenbeck v. Hagenbeck Zoological Arena Co.* 59 Fed. Rep. 14. In this case the trustee and complainant had entered into an agreement, and the trustee refused to account because of

an alleged breach of the contract. The court says: "The defendants have no right in law to arbitrarily seize upon that which belongs to another, even to secure a liquidation of their supposed damages."

⁵In *Ladd v. Harvey*, 21 N. H. 514, the court say: "Where there is some evil actually existing, or some evidence of danger to the property upon the filing of the answer, a receiver will be appointed. *Hugonin v. Basely*, 18 Ves. Jr. 105. So, where before answer there is evidence that the property is in danger from insolvency actually existing or expected. *Middleton v. Dodswell*, 13 Ves. Jr. 266. And a receiver will be appointed before answer where justice requires it. *Duckworth v. Trafford*, 18 Ves. Jr. 283. The exercise of the power to appoint a receiver must depend upon sound discretion, and be a case in which it must appear fit and reasonable that some indifferent person under approved security should receive and distribute the issues and profits for the greater securities of all the parties concerned. *Verplank v. Caines*, 1 Johns. Ch. 57. A receiver is proper if the fund is in danger, and this principle reconciles the cases found in the books. *Orphan Asylum v. McCartee*, Hopk. Ch. 435."

court of chancery to change the will of the testator in this regard, in the absence of proof of misbehavior on the part of such testamentary guardian.¹ It has remained the law, supported by reason and authority, from that time to this, that where a trustee has been appointed by a testator as executor or as guardian, the court, in the absence of strong proof, will not interfere with such selection by the appointment of a receiver.² But where it is shown that the executor has absconded and that there is danger to the estate a receiver will be appointed;³ or if he is incompetent and waste is likely to follow.⁴ Where a receiver has been appointed for

¹ *Dillon v. Lady Mount Cashell*, 4 Bro. C. P. 806.

² *Middleton v. Dodswell*, 18 Ves. Jr. 268. In this case Lord Erskine said: "It is for the testator, not the court, to say in whom the trust for administration of the effects shall be reposed." Cf. *Stairley v. Rabe*, McMull. Eq. 21.

³ *Pitcher v. Hellier*, Dick. 580. So also, in *Browell v. Reed*, 1 Hare, 434, it was held that in case of misconduct a receiver might properly be appointed, but not because one of several trustees had disclaimed, or was inactive, or had gone abroad.

Where a receiver was appointed to take charge of an infant's estate and invest the same, and report to the court annually, and he deposited a portion of the money in a bank in another state to his credit as receiver, on which deposit he was paid interest by the bank, which afterwards failed, he was liable for the loss, as he had failed to report to the court the manner in which he had invested the infant's estate, although he had acted in the best faith. *State, Collins, v. Gooch*, 97 N. C. 186.

⁴ *Stairley v. Rabe*, McMull. Eq. 22. In this case the executrix had married an impecunious husband who was manifestly incompetent to manage the trust in a judicious manner, and the estate was likely to be wasted

or diminished through neglect or ignorance. It has been held in *Temple v. Williams*, 91 N. C. 82, that where a receiver is appointed in lieu of a guardian removed, he is not invested with the powers of a guardian, but acts under the control of the court until another guardian is appointed. Where there had been several trustees, one of whom was dead, one abroad, and the business fell exclusively on one, and application was made for a receiver, the acting trustee consenting, a receiver was appointed. *Tidd v. Lister*, 5 Madd. 433. Cf. *Browell v. Reed*, 1 Hare, 434. Where two are appointed and one declines to act, the court will appoint a receiver on behalf of an infant *cestui que trust*, with liberty to either of the trustees to offer himself. *Tait v. Jenkins*, 1 Younge & C. Ch. 491. It is not proper to appoint the next friend of infant as receiver. (*Stone v. Wishart*, 2 Madd. 64); nor is it proper to appoint a trustee and executor receiver.

_____ *v. Jolland*, 8 Ves. Jr. 72. Cf. *Sykes v. Hastings*, 11 Ves. Jr. 363; *Sutton v. Jones*, 15 Ves. Jr. 584. Lord Eldon, in *Sykes v. Hastings*, *supra*, says: "The appointment of a trustee as receiver is extremely rare; and only where he will act without emolument. * * * The principle of the court is that the trustee shall not be receiver if any other can be procured."

the benefit of two infant tenants in common he will not be discharged upon one of the infants becoming of age.

§ 310. Lunatics' estates.

Pending an application to determine the lunacy of a person an *ad interim* receiver may be appointed with power to take possession of the estate on giving bond, and also with leave to be appointed *ad litem* in actions pending against such alleged lunatic.¹ But the court in making such appointment will not select the solicitor of the lunatic, even where it is stated that no one else is willing to accept;² nor a master in chancery, if his accounts are to be passed upon by another master.³ On the death of a lunatic the office of the committee ceases, and the court possesses only power to compel him to account and deliver possession of the property to the persons entitled thereto. In the meantime, if there is reason to apprehend delay in ascertaining who are entitled to the possession, a receiver may be appointed to preserve the property, on the application of the parties in interest;⁴ and such receiver must account as in other cases.⁵

¹ *Smith v. Lyster*, 4 Beav. 227.

² *Re Pountain*, L. R. 37 Ch. Div. 609. In this case the order was made *ex parte*.

³ *Ex parte Pincke*, 2 Meriv. 452.

⁴ *Ex parte Fletcher*, 6 Ves. Jr. 427. This was a case for the appointment of a committee of a lunatic's estate, but the principle is the same as in cases of receivership. The theory of the case may be sound, but evidently its application in many cases would be a matter of discretion. Cf. *Re Ferrior*, L. R. 8 Ch. App. 175.

⁵ *Re Colvin*, 8 Md. Ch. 278 (288); *Duchess of Norfolk's Case*, cited in *Shelford on Lunacy*, 210. Cf. *King v. King*, 6 Ves. Jr. 172; *Edmunds v. Bird*, 1 Ves. & B. 88; *Ball v. Oliver*, 2 Ves. &

B. 96; *Atkinson v. Henshaw*, 2 Ves. & B. 85. But see *Richards v. Chave*, 12 Ves. Jr. 462. Lord Eldon, in *King v. King*, *supra*, places the appointment on the ground "that the property is in danger in this sense, that it may get into the hands of persons who have nothing to do with it." Cf. *Rendall v. Rendall*, 1 Hare, 152. On the appointment of an administrator or executor by the proper court the duties of the receiver thenceforth cease, and so on the appointment of an administrator *pendente lite* as to personal property and as well real estate. *Re Colvin*, *supra*.

⁶ *Wing v. Champion*, 1 Tenn. Ch. 515. In this case it was held that he should account at least once a year.

CHAPTER XVII.

MISCELLANEOUS RECEIVERSHIPS.

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| § 315. As between vendor and vendee. | § 319. As between lessor and lessee. |
| § 316. Between creditor and debtor. | § 320. In ejectment suits. |
| § 317. In partition suits and between tenants in common. | § 321. In alimony suits. |
| § 318. In suits for specific performance. | § 322. For building and loan associations. |
| | § 323. Grounds for appointment. |

§ 315. As between vendor and vendee.

Sometimes the court is asked to appoint a receiver in behalf of the owner of real estate where he has executed a contract of sale to a purchaser, and delivered possession under the contract, and there is a default in the payments. The action in such case is based upon the plaintiff's right to rescind the contract by reason of nonpayment, or to have the property sold in payment of the remaining unpaid purchase money, coupled with proof showing insolvency of the purchaser or waste or other inadequacy of security.¹ But relief will not be granted if it appears that the insolvency of the purchaser was known to the seller when the contract was made,² or where the plaintiff's right of recovery is fully denied.³ The same relief is not granted as between the seller and purchaser of a stock of goods even where insolvency is shown, unless there be an express reservation of title in the seller.⁴

¹A receiver of rents and profits may be appointed in an action to foreclose a contract for the sale of land where the land affords inadequate security for the amount due, and is rapidly depreciating in value. *Smith v. Kelley*, 81 Hun, 387.

A vendor who has sold land upon a credit to one who has given notes signed, as trustee, for the payment of the purchase money in two equal annual instalments, is not entitled to have a receiver, upon failure to pay one of the instalments when due, where it does not appear that the purchaser or his *cestui que trust* is less

solvent than at the time of the purchase. *Tumlin v. Vanhorn*, 77 Ga. 315.

McCaslin v. State, 44 Ind. 151; *Phillips v. Eiland*, 52 Miss. 721; *Gunby v. Thompson*, 56 Ga. 316; *Worrill v. Coker*, 56 Ga. 666; *Tufts v. Little*, 56 Ga. 139; *Chappell v. Boyd*, 56 Ga. 578; *Jordan v. Beal*, 57 Ga. 602; *Collier v. Sapp*, 49 Ga. 93.

²*Jordan v. Beal*, 57 Ga. 602; *Tumlin v. Vanhorn*, 77 Ga. 315.

³*Hughes v. Hatchett*, 55 Ala. 631.

⁴The vendor of a stock of goods upon condition that they shall not be removed from town, and that the pro-

§ 316. Between creditor and debtor.

On a bill filed by a creditor to subject the property of his debtor, which has been fraudulently conveyed, to the payment of his debt, and the insolvency of the fraudulent purchaser is shown, a receiver may be appointed;¹ but such relief will not probably be granted if an adequate remedy at law might have been available, such as attachment.²

§ 317. In partition suits and between tenants in common.

In matters between tenants in common, where a suit for partition is pending, the appointment of a receiver has sometimes been made, but the cases in which such action has been taken are ex-

ceeds of sales shall be turned over to him until the balance of the purchase price is paid, has, in the absence of an express reservation of title, no such interest therein as to entitle him to a receiver upon the failure of the purchaser to comply with the agreement as to proceeds, though the latter is insolvent. *Steele v. Aspy*, 128 Ind. 367.

That he may by stipulation retain title is well settled, but it must be plain and express. *Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 81; *Hodson v. Warner*, 60 Ind. 214.

When there is reasonable ground to apprehend that, pending litigation, the property subject to litigation will be disposed of fraudulently or in such a way as to deprive the complaining party of the fruit of his recovery when had, the court will appoint a receiver. *Ellett v. Newman*, 92 N. C. 519.

¹ A creditor who has filed a bill to subject personal property fraudulently disposed of by a deceased debtor to the payment of his debt, and has caused process to be served thereon, may have a receiver of the property if there is a reasonable prob-

ability of recovery, and danger of loss from misconduct or insolvency if it is permitted to remain in the possession of the defendant. *Worborn v. Kahn*, 93 Ala. 201.

² A receiver will not be appointed on application of an attaching creditor, in a suit by him to set aside a fraudulent conveyance of personalty by his debtor, where his remedy at law was lost by his own laches in failing to have the attachment levied when a regular and valid levy could have been made and the property lawfully taken under the writ. *Pearce v. Jennings*, 94 Ala. 524.

In a suit to set aside as fraudulent an assignment for benefit of creditors and for a receiver of the property, it is error to appoint a receiver, with instructions to collect in the assets and deliver them to the assignees. *Nussbaum v. Price*, 80 Ga. 205.

A creditor seeking to set aside conveyances of land by his debtor as fraudulent is not entitled to the appointment of a receiver of the rents and profits, in the absence of proof that the grantees are insolvent. *Clark v. Raymond*, 85 Iowa, 737.

ceedingly rare. The grounds for the appointment in such cases are usually

(a) Where one tenant is in possession and excludes his cotenant from participation in the possession or income.¹

(b) Where the tenant in possession is insolvent and refuses to account to his cotenant.²

(c) Where one tenant refuses to join his cotenant in the execution of necessary leases for the property owned in common, or interferes in the collection of rents with the tenants in possession.³

(d) Where the court can see from the showing made that the appointment of a receiver is required in order to properly protect the interests of parties.⁴

¹ *Milbank v. Revert*, 3 Meriv. 405; *Low v. Holmes*, 17 N. J. Eq. 148; *Goodale v. 15th Dist. Ct. of San Francisco*, 56 Cal. 26; *Duncan v. Campau*, 15 Mich. 415. But see *Varnum v. Leek*, 65 Iowa, 751. Cf. *Sandford v. Ballard*, 83 Beav. 401; *Vaughan v. Vincent*, 88 N. C. 116.

² *Darcin v. Wells*, 61 How. Pr. 259; *Parker v. Parker*, 82 N. C. 165; *Williams v. Jenkins*, 11 Ga. 595; *Stith v. Jones*, 101 N. C. 360; *Thomas v. Nantahala Marble & T. Co.* 58 Fed. Rep. 485.

³ In an equitable action for the partition of real estate, where the plaintiff showed good reason to believe that some portion of the property could not be rented, in consequence of the refusal of the defendant to unite with the other tenant in common (plaintiff), and that the rents of other portions which had been rented could not be collected in consequence of her interference,—Held, that it was proper, in order to preserve the property from serious loss, to appoint a receiver. *Pignolet v. Bushe*, 28 How. Pr. 9.

Plaintiffs in partition, having a right to have a receiver appointed, cannot be deprived of that right on the objection of a defendant because the person claiming the rents is amply re-

sponsible, though the defendant offers to indemnify against loss by such collector, or to take charge of the estate and collect the rents free of charge, and give a bond of indemnity. *Rapp v. Reehling*, 123 Ind. 255.

Pending an application for a partition by one of two tenants in common there is no ground for the appointment of a receiver at the request of one tenant in common, simply because the other is in possession, under Iowa Code, § 2908, allowing the court, in all civil actions, to appoint a receiver if the interests of either party will be promoted. *Varnum v. Leek*, 65 Iowa, 751.

⁴ *Ames v. Ames*, 148 Ill. 321; *Pignolet v. Bushe*, 28 How. Pr. 9; *Bowers v. Durant*, 2 N. Y. S. R. 127; *Weiss v. Welsh*, 30 N. J. Eq. 431; *Duncan v. Campau*, 15 Mich. 415. Cf. *Evelyn v. Evelyn*, 2 Dick. Ch. 800; *Sandford v. Ballard*, 83 Beav. 401; *Hargrave v. Hargrave*, 9 Beav. 549; *Smith v. Lyster*, 4 Beav. 227; *Rutherford v. Jones*, 14 Ga. 521; *Low v. Holmes*, 17 N. J. Eq. 148; *Street v. Anderton*, 4 Bro. C. C. 414; *Knowles v. Clayton*, 2 L. J. Ch. 181.

Pending a suit for a sale of land for division among cotenants, equity will not, by appointing a receiver, inter-

§ 318. In suits for specific performance.

A receiver will sometimes be appointed in a suit pending to enforce the specific performance of a contract, where it is necessary, by reason of insolvency or other good cause shown, in order to adequately protect the parties.¹ And also where real estate has been sold and the purchaser is permitting the property to go to waste and thus lessening the vendor's security.² This, of course, is based upon vendor's right to a lien for the unpaid purchase money.

§ 319. As between lessor and lessee.

Where a party is clothed with title and possession such as are conferred by a lease in writing and is in the enjoyment of rights apparently legal a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff must show a clear right in such case or at least such a prima facie case, with such attending circumstances of danger or probable loss, as will move the conscience of a chancellor to interfere.³

§ 320. In ejectment suits.

A receiver will not be appointed in an ejectment suit between the first and second trials where the first results in a judgment in favor of the plaintiff, under a statute providing for giving a

where defendant, who is a nonresident without property in the state save the machinery on the land, is operating the wells and selling the product. *Galloway v. Campbell*, 142 Ind. 324.

A receiver of the rents and profits of tenement houses will not be granted at the suit of the life tenant against a remainderman who, by agreement of the parties, has been managing the property, in the absence of proof of mismanagement resulting to the plaintiff's injury. *Rollwagen v. Rollwagen*, 37 N. Y. S. R. 293.

¹ The appointment of a receiver to operate oil wells pending an action for the specific performance of a contract to assign a lease is authorized

where defendant, who is a nonresident without property in the state save the machinery on the land, is operating the wells and selling the product. *Galloway v. Campbell*, 142 Ind. 324.

A receiver may be appointed of a fund arising from a contract with the United States government, in a suit to enforce specific performance of an agreement by the contractor to transfer the checks. *Leonard v. Whaley*, 91 Hun, 304; *Taylor v. Eckersley*, L. R. 2 Ch. Div. 302. But see *Morford v. Hamner*, 8 Baxt. 391; *Darumont v. Patton*, 4 Lea, 597.

² *Gibbs v. David*, L. R. 20 Eq. 373; *Smith v. Kelley*, 31 Hun, 387; *Philips v. Eiland*, 52 Miss. 721.

³ *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 88.

bond by the defendant securing the plaintiff against all costs and damages that may be recovered against him, the bond in such case being considered an ample protection to the plaintiff.' The general rule is that as between contestants over legal title a court of equity will not interfere and appoint a receiver over the income or crops.' There must be strong grounds for relief shown, in which the element of danger of loss is apparent.'

§ 321. In alimony suits.

Where a decree for alimony has been rendered a proceeding supplementary to execution may be based thereon, and a receiver appointed over the defendant's effects.' But independently of any statutory provision a suit in equity may be maintained to compel the payment of alimony decreed to a wife.'

¹ A receiver to harvest and sell crops will not be appointed, pending the statutory new trial, in an ejectment action, as the undertaking to pay all costs and damages which shall be recovered in the action, required by Ind. Rev. Stat. 1894, § 1076, as a condition of a new trial, affords an adequate remedy at law if damages for conversion of the crops would be recoverable in the action, and, if not recoverable, the remedy would be improper. *Stephens v. Kaga*, 142 Ind. 523.

² *Thompson v. Sherrard*, 22 How. Pr. 155, 35 Barb. 593; *Corey v. Long*, 12 Abb. Pr. N. S. 427; *People v. New York*, 10 Abb. Pr. 111, reversing 8 Abb. Pr. 7.

The refusal in such case to grant plaintiff a receiver of the rents and profits is based upon the fact that the action of ejectment is not for the unlawful withholding of possession, but is brought against the defendants as trespassers, and the claim against defendants is for damage as trespassers. The appointment of a receiver to recover damages in an action of trespass is unknown to the law. In *Bateman v. San Francisco Super. Ct.* 54 Cal. 285,

it is held that a receiver in ejectment cases cannot be appointed under the California code. In *Rollins v. Henry*, 77 N. C. 487, it is held that where the contest is simply one over disputed title to property, both parties claiming the legal title, a receiver will not be appointed even where the defendant is insolvent. A receiver will be appointed only when the plaintiff sets forth an apparently good title, not sufficiently controverted by the answer, and shows imminent danger of loss. *Scott v. Scott*, 13 Ir. Eq. 212. Cf. *Kron v. Dennis*, 90 N. C. 327; *Whitworth v. Wofford*, 73 Ga. 259; *Davis v. Taylor*, 86 Ga. 506.

³ *Ireland v. Nichols*, 37 How. Pr. 232. The statute under which this decision was rendered provided that the plaintiff should have damages for the rents and profits of the premises recovered. See, *contra*, *Thompson v. Sherrard*, 35 Barb. 593. Cf. *Rogers v. Marshall*, 6 Abb. Pr. N. S. 457; *Payne v. Atterbury*, Harr. Ch. (Mich.) 414; *Frisbee v. Timanus*, 12 Fla. 300; *Whitney v. Buckman*, 26 Cal. 447.

⁴ *Barker v. Dayton*, 28 Wis. 367.

⁵ *Barber v. Barber*, 63 U. S. 21 How. 582, 16 L. ed. 226. In *Kirby v. Kirby*,

§ 322. For building and loan associations.

The right of a court of equity to appoint a receiver of a building and loan association is well recognized, but the grounds upon which it will intercede and take the temporary management of these concerns under its control through a receivership is not free from difficulties. The corporate franchises of these associations, being granted by the state, are at all times subject to revocation by the state for a violation of the charter privileges granted in the appropriate actions therefor, but these proceedings on an action to be set in motion by the state alone, where the public alone, as a body, are interested, are not available to the individual for the protection of private rights and the redress of private wrongs.

The chief difficulty arises from the peculiar relationship existing in such associations between the members towards each other, and the unique relationship of each to the corporate entity. The members are of two kinds, depositors and borrowers, each class sustaining peculiar relations to the other. They have been, and not inaptly, termed corporate copartnerships for the reason that the stockholders are in effect copartners in their business relations. Each contributes at stated periods fixed amounts as contributions to a common fund and this fund is loaned out, as a rule, upon real estate security, and repaid in instalments with interest and premiums, and these are also contributions to the common fund for reinvestment. The members while called stockholders are in fact *quasi* partners in the results of their investments. Owing to the peculiar nature of the business it is imperative that the transactions shall be under the supervision of a board of directors,

1 Paige, 261, the court says: "The injunction, receiver, and *ne exeat* may all properly be made use of to aid the court in doing justice between the parties." So also in *Questel v. Questel*, Wright (Ohio) 492, where a husband conveyed his property to his son to prevent a recovery for alimony on a bill pending for such purpose it was held that a court of chancery may properly enjoin the parties from further changing the property, and appoint a receiver to secure the income to satisfy the alimony. To the same

effect is *Carey v. Carey*, 2 Daly, 424. In *Holmes v. Holmes*, 29 N. J. Eq. 9, a receiver is said to be justifiable if the defendant will not give bond, with satisfactory security for the payments. Cf. *Stillman v. Stillman*, 7 Baxt. 169.

It would seem that a court which renders a decree for alimony would be enabled to enforce that decree by appointing a receiver, if necessary, and that no separate and independent proceeding based on such decree is required unless it is necessary to go to a foreign jurisdiction to enforce it.

managing committee, or other body, with appropriate officers. These governing bodies, under whatever name designated, are trustees in the strictest sense of the word, charged with the management of the company's business in accordance with the statutory requirements, and the by-laws, rules, and regulations adopted for its management, and are responsible not only for the safe-keeping of the funds contributed, but for judicious and profitable investment thereof so that the profits derived shall mature the stock of the members within given periods. The investors, as a rule, have small holdings, are often scattered over large areas of territory, and generally from inexperience or situation are of necessity expected to place a large degree of confidence in the managing officers, and the latter assume a corresponding degree of responsibility and accountability. The strictness and faithfulness attaching to the directory of the ordinary corporation in the management of its affairs are redoubled when applied to the governing board of the building and loan society. Coupled with the responsibility in the management of these institutions is another element which renders the facilities for mismanagement wide and extended, and this has caused the state in many cases to place these societies under the supervision of designated state officials, charged with the duty of keeping the management within the statutory requirements, as well as to detect any evidence of negligence or misconduct on the part of the corporate officials. Thus it will be seen that the inherent character of these institutions, the attitude of the state towards them in its efforts to shield their members from mismanagement, the large and increasing number of them, the aggregate volume of corporate funds seeking investment, and the wide fields afforded for reckless management and maladministration,—all render courts of equity peculiarly appropriate tribunals not only for the prevention of loss and injury to creditors and stockholders, but for settling and adjudicating the conflicting rights and interests of the members in their several classes, as well as the winding up and distribution of the assets according to the equities of all parties.

§ 323. Grounds for appointment.

The ordinary and usual grounds upon which the application for a receiver in this class of cases is made is the fraudulent misman-

agement of the affairs of the association, disregard of the charter and by-laws, embezzlement of the officers, and insolvency of the association.¹

¹In *Tivole v. American Bldg. L. & I. Soc.* 60 Fed. Rep. 181, a stockholder in the association filed a bill in behalf of himself and all other shareholders joining him upon which a receiver was appointed with the consent of the corporation and one of the questions was as to the authority of the court to appoint a receiver. The court says: "The complainant is substantially both depositor and shareholder. Under the constitution of the society he passed into the treasury periodically certain stipulated funds. The fund thus collected is loaned out upon real estate security. The interest of the member is not that simply of a depositor in a bank or a creditor of a corporation. He holds no promise of the corporation for a return of his fund. He is a part holder of the fund—has an interest directly in the fund—and is entitled to a proportionate share as owner upon its distribution. The whole scheme of building associations is that of a corporate copartnership whereby are gathered into a common fund and loaned as such the money of many individuals. The interest of each stockholder in the sums thus collected and loaned is as direct as if no corporation intervened. The corporation has no function or power except to loan out these gathered sums and return the avails thereof into the hands of the contributors. If the stockholder of a corporation or a partner in copartnership can rightfully invoke the aid of equity to administer the assets of the corporation or copartnership when such power seems essential to the conservation of the assets I can see no reason why the complainant is not entitled to a like

aid. That the relief will be afforded to stockholders and copartners upon a proper showing is not seriously denied. The need of such relief in this case seems to me to be imperative. The society, I think, largely through the mismanagement of its officers, has so impaired the assets that there appears to be on hand less than sixty-six per cent on a dollar contributed. There is no claim that this loss is merely temporary, or that the continuance of this society in its present management will repair the evil. A continuance of the organization would simply be a hardship upon already injured shareholders and nothing in their interest can be suggested except a speedy and intelligent collection of the assets for distribution among the members. This, manifestly, ought not to be done by the management that has brought about the injury and there is no way pointed out for the substitution of a new management that will promise a better administration. Here the debt is \$900,000 collected from innumerable sources. Most of the contributors are among the poor, people not accustomed to the management of business affairs. This large fund is scattered through five or six states and already promises a return of less than sixty-six per cent of the original advance. There is no management in power except the discredited and distrusted officers. Upon what pretext can a court of equity close its ears against the call to take hold."

Subsequently the same case came before the court and is reported in 61 Fed. Rep. 446, where the rights of the stockholders and the order of distribution are discussed.

The case of *Hoboken Bldg. Asso. v. Martin*, 18 N. J. Eq. 427, is devoted to a discussion as to the rights and interests of shareholders and the mortgagors in the society and the parties and the rights of adjustment with reference to the peculiar facts of the case.

In *Frostburg Bldg. Asso. v. Stark*, 47 Md. 338, application was made by stockholders for a receiver of the corporation alleging gross and fraudulent mismanagement of the affairs of the association, violation of its charter and by-laws by the officers, embezzlement by the secretary, misappropriation by one of the directors, and that the directors had refused to take steps to recover the amount due from the defaulting officers, were doing business without a treasurer and without a bonded secretary, and that the corporation was insolvent. Under these allegations the court appointed a receiver and the appointment was held proper on appeal.

Low Street Bldg. Asso. No. 6 v. Zucker, 48 Md. 448, was a case adjusting the rights between the mortgagor and mortgagee and holding that the

mortgagor could not be called upon to contribute to the losses and liabilities of the association.

In *Christian's Appeal*, 102 Pa. 184, the court say that the appointment of a receiver to administer the assets of an insolvent association may be strictly regular, but where the same result may be more directly, and equally as well, attained by an assignment, the latter course should be followed.

Frostburg Bldg. Asso. v. Stark, 47 Md. 338. In this case there was also an allegation that the officers refused to take steps to recover the amount due from defaulting officers. Cf. *Toules v. American Bldg. L. & I. Soc.* 60 Fed. Rep. 131.

Where the active operations of a company have ceased and its affairs are in course of settlement under the direction and control of a court of equity it is, to all practical purposes, equivalent to a dissolution of the corporation. *Peters Bldg. Asso. No. 5 v. Jaacksch*, 57 Md. 198.

The court is averse to appointing a receiver without notice. *Frostburg Bldg. Asso. v. Stark*, 47 Md. 338.

CHAPTER XVIII.

REMOVAL AND DISCHARGE OF RECEIVER.

- § 330. Removal and discharge.
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| (a) Notice of application. | (e) Removal not subject to appeal; effect of appeal. |
| (b) Application for removal. | (f) Effect of removal and discharge. |
| (c) Application, by whom made. | (g) Grounds for refusal to discharge. |
| (d) Grounds for removal. | |

§ 330. Removal and discharge.

(a) NOTICE OF APPLICATION.

Before the court will entertain a notice to remove or discharge a receiver, notice should be given of the intended application to all parties in interest. The action of the court in the appointment having been in the interest of all parties who at the end of the litigation might establish a right to the property or fund, it is necessary that all should be heard or have an opportunity to be heard in the matter of removal or discharge.¹ Want of notice

¹ *Brown v. Perry*, 1 Ch. (Ont.) 253; *Coburn v. Ames*, 57 Cal. 201.

A court which has made an ancillary appointment of a receiver appointed in another jurisdiction will not entertain the question of the removal of such receiver for misconduct, but the application should be made to the court originally appointing him. *Chattanooga T. R. Co. v. Felton*, 69 Fed. Rep. 278.

A court will entertain a motion to discharge, though the order appointing was made on notice. *Sanders v. Christie*, 1 Grant Ch. (Ont.) 187.

In *Bruns v. Stewart Mfg. Co.* 31 Hun, 316, it appeared that a new receiver was substituted in the place of a former one, and it was held that where the motion to vacate the order had been denied, the court could not, upon objections by other persons, re-

move the receiver for different or other reasons without notice.

In *Attrill v. Rockaway Beach Improv. Co.* 25 Hun, 509, it is held that notice for the removal of the receiver should be served upon all the parties who have appeared in the action.

In *Young v. Montgomery & E. R. Co.* 2 Woods, 606, it is said that no court or judge would order the removal of a receiver *ex parte* without giving them their day in court. "No matter what showing the complainants may be able to make as to the incompetency, unfitness, or dishonesty of the receiver, this court cannot act. That showing must be made to the court which appointed him."

It has been held, however, that notice to creditors is not required. *New York & W. U. Teleg. Co. v. Jewett*, 115 N. Y. 166.

though irregular would probably not justify a reversal.¹ The receiver as a rule is not entitled to notice, for the reason that he has no interest in the subject-matter of the litigation.² If, however, the removal is based upon some act or alleged misconduct of the receiver, then in such case he is entitled to notice and to know the grounds upon which the application is to be based.³

(b) APPLICATION FOR REMOVAL.

If the application for removal is based upon the act of the receiver, it should be made in the form of a petition, setting forth the facts upon which it is based, so that an issue may be formed,⁴ and the application must be made in apt time,⁵ or at least on con-

¹ *Coburn v. Ames*, 57 Cal. 301.

² In *Howard v. Lowell Mach. Co.* 75 Ga. 325, it was held that an order appointing a receiver may be revoked without notice. It is only in cases where the receiver's conduct is called in question and where it is sought to make him liable, or where he is called upon to account or make return that he is entitled to a notice or to a hearing. He is not entitled to a notice or a hearing when the question relates to the necessity of his appointment or of the continuance of the appointment.

³ A motion to dismiss a receiver will not be granted until he has had reasonable notice in writing of such intended motion, and the grounds upon which his removal is sought must be specifically set out in such written notice. *Dougherty v. Jones*, 37 Ga. 348; *Young v. Montgomery & E. R. Co.* 2 Woods, 606.

In *State, Pettenger, v. Claypool*, 13 Ohio St. 14, the receiver being appointed by statute by the state officers, it was held that he was not removable under the statute at their pleasure.

Where a receiver of a corporation, pending an action brought by him as such, was removed, and a successor appointed, and the original receiver afterwards died, and subsequently the

second receiver was removed and a third appointed,—Held that it was proper to substitute the third receiver as plaintiff in the action in place of the first. *Sheldon v. Adams*, 18 Abb. Pr. 405, 27 How. Pr. 179, 41 Barb. 54.

⁴ Where it is necessary, in order to obtain the desired relief, that an intervenor obtain the vacation of an order appointing a receiver, a summary proceeding by motion is not the appropriate remedy, but this should be done by a petition setting forth the facts upon which he relies, to which the receiver may interpose an answer and take issue. *Jacobson v. Landolt*, 73 Wis. 142.

⁵ If, during the term of the court that appointed a receiver, there is, by adjournment, such an interval in the session as to prevent the application for his removal to be made to the same, without causing injustice by the delay, it is the duty of the judge at chambers to act thereon. *Cincinnati, S. & O. R. Co. v. Sloan*, 31 Ohio St. 1.

Creditors of a state bank who have acquiesced for several months in the appointment of a receiver of the bank on the application of a stockholder, during which time large expenses have

dition that the receiver's expenses and compensation be paid,¹ and should be made in the court in which the receiver was appointed.² The removal rests in the sound judicial discretion of the court, to be exercised under all the circumstances of each particular case.³

been incurred in the administration of the receivership, are estopped to claim the illegality of the appointment where it is at most voidable only, and not void. *Dickerson v. Cass County Bank* (Iowa) 64 N. W. 395.

The court may vacate an order appointing a receiver pending a motion for a new trial of the case in which such appointment was made. *Copper Hill Min. Co. v. Spencer*, 25 Cal. 11.

The court may, at any time before the appointment of a receiver, which they have directed, is consummated, revoke such appointment and appoint another. *Siney v. New York Consol. Stages Co.* 18 Abb. Pr. 435, 28 How. Pr. 481.

¹ Where a receiver appointed in an action commenced when a former action between the same parties and on the same subject-matter was pending in another court, had expended moneys in the matter of the receivership,—Held, on granting a motion to stay proceedings and to vacate the order for his appointment, that it should be done on condition that his expenses and compensation be paid by the moving party. *McCarthy v. Peake*, 9 Abb. Pr. 164.

² The rights of one having a judgment against another as receiver, with a direction that his claim be paid from a certain fund at that time in the receiver's hands, cannot, pending an appeal from such judgment, be taken away by a judgment or direction in another action discharging the receiver, to which he was not a party. *Woodruff v. Jewett*, 115 N. Y. 267, Reversing 37 Hun, 205.

In *Attrill v. Rockaway Beach Improv. Co.* 25 Hun, 376, it is held that a receiver appointed in one judicial district cannot be removed upon an application made in another judicial district; that a receiver appointed in an action should not be removed without notice of the application to the plaintiff at whose instance he was appointed.

Proceedings to remove must necessarily be in the case in which he is appointed. *Mechanics' Nat. Bank v. Landauer*, 68 Wis. 44.

A mortgagee in possession having been adjudged to be in possession as such, and appointed receiver,—Held that another judge should not remove him for any cause existing before the order of his appointment was made, but might control his administration of the trust. *Bolles v. Duff*, 35 How. Pr. 481.

³ In *Milwaukee & M. R. Co. v. Soutter*, 69 U. S. 2 Wall. 510, 17 L. ed. 900, it is held that the appointment or discharge of a receiver is ordinarily a matter resting wholly within the discretion of the court, but is not always absolutely so. That in a foreclosure proceeding where the amount due on the mortgage is a matter unsettled and contested, the appointment or discharge of a receiver is in the discretion of the court in which the litigation is pending. When the amount due has been passed upon and fixed and the right of the mortgagor to pay settled, the court has no discretion to withhold the restoration of the property, and the refusal to discharge the receiver is a judicial

(c) APPLICATION, BY WHOM MADE.

The application for the discharge of the receiver may be made by the defendant, a stockholder or creditor, or other party in interest, where a proper showing is made and the court is of opinion the interests of all concerned will be protected.¹ The

error which the appellate court may correct. In such case the discharge is proper, even though third parties set up claims to the road which they asked the receiver to provide for and protect, but which are disputed and contested. The court will exercise the power of discharging under conditions, such as that of the company giving security to pay the claims if finally established as liens.

The exercise of the power to remove a receiver rests in the discretion of the court, and is to be governed by the circumstances of each particular case; and bias and partiality are good grounds for its exercise. *Detroit First Nat. Bank v. Barnum Wire & I. Works*, 60 Mich. 487, 58 Mich. 124, 815; *Davis v. Gray*, 83 U. S. 16 Wall. 217, 218, 21 L. ed. 452; *Merchants & M. Nat. Bank v. Kent Circuit Judge*, 48 Mich. 297.

A chancellor may in his sound discretion refuse to terminate a receivership in an action attacking an attachment, and to deliver the money in the receiver's hands to the attachment creditors who have recovered a judgment in the attachment action pending an appeal taken upon mere suretyship for costs from a judgment in their favor, where the fund is large and they are nonresidents. *Ex parte Hood* (Ala.) 18 So. 176; *Re Albert Average, etc.* L. R. 5 Ch. App. 597.

¹ *Atkins v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 161.

In an application of the defendant to vacate and set aside the appointment of a receiver in an action

to foreclose a chattel mortgage, the court ordered the receiver to be discharged if the defendant would execute a bond to pay the judgment and costs, which bond the defendant voluntarily executed, and had restored from the receiver all the property. Such defendant cannot contest the legal costs of the receiver or any irregularity in his appointment. *State Journal Co. v. Commonwealth Co.* 48 Kan 98.

But where the receiver is appointed under a creditor's bill filed in behalf of all, the removal will not be made against the consent of a judgment creditor, even though a defendant. *Largan v. Bowen*, 1 Sch. & Lef. 296; *Murrough v. Trench*, 2 Moll. 497. *Cl. Re Association of Land Financiers*, L. R. 10 Ch. Div. 269.

A receiver appointed on an application of debenture holders, with power to manage the business of the corporation until the creditors' petition to wind up is disposed of, should not be discharged when continued after the making of the winding-up order, because leave is given to discontinue the business, where interest on the debentures is in arrears, and there is no uncalled capital, and the assets of the company are not enough to pay the debentures. *Strong v. Carlyle Press* [1893] 1 Ch. 268.

In *Fifth Nat. Bank v. Pittsburg & C. S. R. Co.* 1 Fed. Rep. 190, it is held that the stockholders of the defendant railroad company cannot obtain the removal of the receiver by petition where it appears that the

application has sometimes been entertained on behalf of the receiver,¹ but as a rule his application will not be granted.²

corporation has a regularly elected board of directors and that such board is in sympathy with the petitioners. As to the grounds upon which an appointment of a receiver of a bank will be vacated on petition of a creditor not a party to the proceedings for the appointment, see *Bowery Bank Case*, 5 Abb. Pr. 415.

¹ The discontinuance of a suit in equity for the account and settlement of the concerns of a copartnership, does not discharge a receiver appointed therein; but will entitle the receiver to apply for his discharge and exonerate himself and his sureties, unless the interests of the defendants require that he should continue in the receivership to protect their rights, in which case the defendant so protected should be required to file a bill forthwith to settle his rights. *Whiteside v. Pendergast*, 2 Barb. Ch. 471.

² The receiver of a broken bank will not be discharged as a matter of course from his trust. He must show good cause, and his mere desire to be released, coupled with the fact that the accounts are complicated, and that much time will be lost from his own business, will not be good cause. *Beers v. Chelsea Bank*, 4 Edw. Ch. 277.

In *L'Engle v. Florida C. R. Co.* 14 Fla. 286, the defendant moved to vacate the order appointing a receiver, to which the plaintiff consented, but the receiver objected. The court held the motion should have been so far as to restore the property to the owner, including the receipts and disbursements of future earnings. The receiver should not be heard in opposition to this motion.

In *Re Colvin*, 8 Md. Ch. 278, 302,

the chancellor says: "But what is it to him (the receiver) what the court does with the property, provided he is discharged from his responsibility as receiver, and that he would be so discharged by obeying the order of court cannot be questioned. It is moreover conceded that the receiver has no rights himself, and of course cannot appeal or interfere in any way in the conduct of the cause, unless he can be considered as representing those at whose instance he was appointed. But to view him in that light would be to give him a character inconsistent with the nature of his office as defined by Chancellor Bland. How can he be the officer of the court and the hand of the court and at the same time the representative of the interests of certain of the parties to the cause? The court must act by its officers and agents, and there is as much propriety in calling the court the representative of any of the parties to the cause as its agents and officers who derive their authority from the court and are removable at its discretion. . . . We hold it therefore to be too clear for doubt that a receiver has no right to intermeddle in questions affecting a right of the parties or the disposition of the property in his hands; that he cannot in any sense or to any extent be regarded as the representative of any one or more of the parties to the cause, and that he must retire from office and give up the property committed to his custody whenever required so to do by the court; and this whether the power to discharge may be so reserved or not, as was correctly stated in the argument."

(d) GROUNDS FOR REMOVAL.

The grounds upon which a receiver may be removed are exceedingly numerous and varied, and in the nature of things no general principles can be laid down upon the subject. Receivers have been removed because of collusion practised in the appointment,¹ where the injunction and *lis pendens* afford ample protection,² or where no property has come into his hands as receiver,³ or where the suit abates by reason of the death of the defendant,⁴ or where plaintiff's indebtedness has been paid,⁵ or where the receiver is guilty of neglect and dereliction of duty,⁶ or where

¹ *Wilson v. Barney*, 5 Hun, 257.

A receiver of a corporation will be discharged upon motion of the court, upon its appearing that the receiver's appointment was procured by collusion between the corporation and one of its creditors, for the purpose of keeping the property of the corporation from the other creditors. *Sage v. Memphis & L. R. R. Co.* 18 Fed. Rep. 571, 5 McCrary, 643, 125 U. S. 361, 31 L. ed. 694.

A receiver of a corporation appointed without notice to the company, upon a bill containing no equity, by consent of the president in collusion with the plaintiffs and without bringing to the notice of the court the fact that he had no authority to give such consent, will be discharged on motion. *Walters v. Anglo-American Mortg. & T. Co.* 50 Fed. Rep. 316.

² Where the objects of a receivership may be secured by continuing an injunction and filing a notice of *lis pendens*, together with a bond for future rents of the property, a receivership may be suspended. *Jones v. Smith*, 40 Fed. Rep. 314.

³ A receiver into whose hands no property has come is entitled to a discharge upon vacation of his appointment. *People v. Bushwick Chemical Co.* 45 N. Y. S. R. 339.

⁴ *Woods v. Creaghe*, 1 Hog. 174.

The abatement of a suit in equity does not discharge a receiver who had been previously appointed. *McCosker v. Brady*, 1 Barb. Ch. 329.

⁵ *Davis v. Marlborough*, 2 Swanst. 118; *Tewart v. Lawson*, L. R. 18 Eq. 490; *Sankey v. O'Maley*, 2 Moll. 491; *Braham v. Strathmore*, 8 Jur. 567.

The payment of a judgment by the debtor, after the appointment of a receiver in supplementary proceedings, does not, *ipso facto*, discharge the receiver. The receiver may have a claim for expenses incurred in the exercise of his authority, which may be required to be paid before the property held by him can be taken out of his possession. *Orook v. Findley*, 60 How. Pr. 375.

⁶ *Re St. George's Estate*, L. R. 19 Ir. 566.

Where an officer of a corporation has been appointed receiver, to wind it up as insolvent, the fact that investigation of his conduct as such officer is necessary is ground for removing him from the receivership. *McCullough v. Merchants' Loan & T. Co.* 29 N. J. Eq. 217.

If the person appointed receiver absents himself, and fails to file the bond ordered, the court may, at its discretion, remove him and appoint another. *McCullough v. Merchants' Loan & T. Co.* *supra*.

the appointment was improvidently made,¹ or where the receiver disobeys the orders of court,² or there is disagreement between joint receivers³ or bitter opposition by some parties in interest,⁴ or even where no unfitness is shown if the general benefit of the company will be subserved by the removal,⁵ or from interest and feelings of the receiver towards the plaintiff⁶ or fraudulent action on his

¹ In *Crawford v. Ross*, 39 Ga. 44, it is held that extraordinary writs and remedies granted by a chancellor before trial on the merits ought to be granted with caution, unless there is immediate danger to the rights of plaintiff if they be denied, and if the court becomes satisfied that the danger does not exist, it is his duty to discharge them. In this case the court ordered the vacating of the order appointing the receiver.

In *Terry v. Bank of Central New York*, 15 How. Pr. 445, the defendant asked the court that the order for an injunction and appointing a receiver be discharged and leave granted to resume business upon the grounds: (1) that the injunction was irregular, having been granted without bond; (2) that the statutes under which the receiver had been appointed had been repealed; and (3) that the defendant was not insolvent within the provisions of the statute, and, upon consideration by the court, the motion was granted.

² *Atkinson v. Smith*, 89 N. C. 72. (Failure to account.)

Upon an account of assets collected by a receiver, he was ordered by the court to pay the amount into bank. Upon a second account it was found that he had not obeyed said decree, and also had not given additional sureties as commanded,—Held that the court might set aside its former decree, remove him, and direct him to pay to one appointed in his place all that he had collected, or render

himself liable to an action. *Shackelford v. Shackelford*, 32 Gratt. 481.

Cf. *Re Tavistock Iron Works Co.* 24 L. T. 605, 19 Week. Rep. 672.

³ Where two receivers of a railroad company were appointed by agreement of all parties interested, with their offices a thousand miles apart, and they subsequently became hostile to each other,—Held that both should be removed, and a resident of the state in which the road mainly lay, who was impartial, should be appointed. *Meier v. Kansas P. R. Co.* 5 Dill. 476.

⁴ A receiver appointed by a United States court under the belief that substantially all interests affected were united in the application therefor will be removed, where it appears that he is bitterly opposed by some of the parties interested and was nominated by the other parties, notwithstanding a receiver had also been appointed by a state court who was a partisan of the parties hostile to the receiver in question. *Wood v. Oregon Development Co.* 55 Fed. Rep. 901.

⁵ *Re British Nat. L. Assur. Assn.* L. R. 14 Eq. 492.

⁶ The circumstances in a particular case were held to justify the removal of a receiver of the property of a joint stock association, appointed in a prior suit, and the appointment of another person in his place, where, upon inspection of the proceedings in the former suit, and from the evidence produced on the application for the appointment of another receiver, it was

part,¹ or where defendant's counsel, though in court, did not know of the appointment.²

(e) REMOVAL NOT SUBJECT TO APPEAL; EFFECT OF APPEAL.

The removal of the receiver furnishes no ground of appeal. The receiver is the mere officer of court and his holding is the holding of the court for the party who may be entitled, and his discharge is no ground of appeal.³

(f) EFFECT OF REMOVAL AND DISCHARGE.

When a receiver has been discharged a creditor cannot thereafter sue him on a claim against the property in the hands of the court,⁴ though it does not follow that the company will be re-

apparent to the court that the trustee who had been appointed receiver in the former suit was, from interest and feelings, adverse to the plaintiff in the second action, and, for other reasons, an improper person to act as receiver in administering the affairs of the association. *McArdle v. Barney*, 50 How. Pr. 97.

¹ An individual who was appointed secretary of an insolvent savings bank by its directors, and was used by them in a month thereafter to make and verify a false statement declaring its solvency, and who was named by them as its receiver in a suit which they caused to be instituted to wind up its affairs, is not a fit and proper person to execute such trust, and should be removed upon application of the creditors of the bank. *People v. Third Ave. Sav. Bank*, 50 How. Pr. 22.

² Where a receiver was appointed, unobserved by the defendant's counsel though he was in court for the whole day to oppose the motion for the appointment, he was, on a motion to vacate, considered as in the same situation as upon the hearing, for the first time, of an application for a receiver. *Merchants' & M. Bank v. Griffith*, 10 Paige, 519.

³ *Washington City & P. L. R. Co. v. Southern Maryland R. Co.* 55 Md. 153; *Ellicott v. Warford*, 4 Md. 80; *Cain v. Warford*, 7 Md. 282.

In a recent case of *Harris v. People* (Ill. App.) 13 Nat. Corp. Rep. 81, held, where a receiver was appointed on final decree and the decree appealed from, that the effect of the appeal before the receiver took possession was to suspend his right to possession pending the appeal, and is based upon the following cases: *Boynton v. Foster*, 7 Met. 415; *Levi v. Karrick*, 15 Iowa, 444; *Turner v. First Nat. Bank*, 30 Iowa, 191; *Carmichael v. Vandebur*, 51 Iowa, 225; *Lewis v. Lewis*, 20 Mo. App. 546; *Townsend v. Townsend*, 60 Mo. 246; *Elgin Lumber Co. v. Langman*, 23 Ill. App. 250. But see *Penn Mut. L. Ins. Co. v. Semple*, 38 N. J. Eq. 314; *Beard v. Arbuckle*, 19 W. Va. 145; *Hutton v. Lockridge*, 27 W. Va. 428. The rule might be otherwise, however, if the receiver was in possession when the appeal was taken.

⁴ After a receiver has been discharged, a creditor cannot sue him on a claim against the property in the hands of the court. *New York & W. U. Teleg. Co. v. Jewett*, 115 N. Y. 166.

After the property is sold, purchased by mortgage bondholders, and

lieved from liability, as where the earnings during the receivership have been expended in betterments.' The discharge does not

conveyed to the original company, one who, during the receivership, has sustained injury from the negligence of the receiver's servants operating the road cannot maintain an action against the receiver and the company. *Ryan v. Hays*, 63 Tex. 42; *International & G. N. R. Co. v. Ormond*, 62 Tex. 274.

The discharge of a receiver pending an action against him will not relieve the corporation represented by him from a liability on a claim against him, although it is not prosecuted by intervention within the time prescribed by the order for his discharge; but the action may proceed against the corporation, where it is shown that assets have gone into its possession which would render it liable to the demand sued on. *Boggs v. Brown*, 82 Tex. 41.

¹Pending and undetermined suits for unliquidated demands cannot be computed as claims against a receiver of a railroad company so as to relieve the company from liability, after the receiver's discharge, on a cause of action which accrued during the receivership, on the ground that the receiver's liability for unadjusted claims exceeds the value of the improvements and betterments made by him out of the earnings coming into his hands. *Texas & P. R. Co. v. Bailey*, 83 Tex. 19.

After the discharge of a receiver and the return of the property to the owner, all control of the court over the property is ended; and such control cannot be retained by an asserted reservation of the right again to assume control. *Texas P. R. Co. v. Johnson*, 76 Tex. 421.

If the earnings of a railroad, of the

property of which a receiver has been appointed, are invested in betterments which are returned to the company at the close of the receivership, the company receives the property charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings during the receivership. *Texas P. R. Co. v. Griffin*, 76 Tex. 441; *Texas P. R. Co. v. Johnson*, 76 Tex. 421.

Proceedings against a receiver to compel the payment of money fall with his discharge. *New York & W. U. Teleg. Co. v. Jewett*, 43 Hun, 565.

When a receiver appointed by a Federal court resigns during the pendency of a suit brought against him under permission of the court appointing him, it is not necessary to obtain permission to prosecute the case against his successor in the receivership. *Fordyce v. Dixon*, 70 Tex. 694.

A railway company is liable on a cause of action which accrued while its road was in the hands of a receiver, who expended its net earnings in betterments and improvements, and upon whose discharge the railway company, with all betterments, was redelivered into the company's possession without sale. *Texas P. R. Co. v. White*, 82 Tex. 548; *Texas & P. R. Co. v. Bailey*, 83 Tex. 19.

A suit in the state courts for damages for personal injuries caused by the negligent operation of a railway while in the hands of a receiver appointed by a Federal court can be maintained against the company after its property has been restored to it, the current earnings having been used by the receiver in improving the road. *Texas & P. R. Co. v. Watts* (Tex.) 18 S. W. 812.

affect the liability of the receiver concerning matters not embraced in his account.⁴ An order discharging a receiver and ordering him to restore it to one of the parties does not of itself determine the right of possession.⁵

(g) GROUNDS FOR REFUSAL TO DISCHARGE.

Where creditors have for several months acquiesced in the appointment of a receiver and have pursued their remedies thereunder, it is too late for them to come into court and undertake to question the legality of the appointment of a receiver.⁶ The employment of the judgment debtor by the receiver to collect a portion of assets is not alone sufficient ground for a discharge,⁷ nor is the fact that the counsel for complainant has sometimes acted as

A railway company is not liable for the negligence of its receiver *ipso facto*, unless it is alleged and proved on the trial that the earnings of its road in the receiver's hands have been invested in betterments of the property, which was turned over to the company on the termination of the receivership. *Texas & P. R. Co. v. Huffman*, 83 Tex. 286.

An action for personal injuries, on a right accrued against a receiver of a railroad company, may be brought against the company when the receiver has been discharged, and all property, together with the earnings of the road while in his hands, have been returned to the company. *Texas & P. R. Co. v. Geiger*, 79 Tex. 13; *Texas P. R. Co. v. Johnson*, 76 Tex. 421.

Where a railroad company, on receiving possession of its road from a receiver, executed a bond to indemnify him against all debts and liabilities incurred by him, in pursuance of an order of court which also required claims to be presented within sixty days, it was not bound to redeem tickets issued by the receiver. *Godfrey v. Ohio & M. R. Co.* 116 Ind. 30.

Where an action against the receiver of a railroad for damage to freight caused while he was operating the road is continued after his discharge, a judgment against the railroad company is erroneous, where no facts are alleged or proved making the company liable for losses during the receiver's management. *Texas & P. R. Co. v. Adams*, 78 Tex. 372.

¹ *Pondir v. New York, L. E. & W. R. Co.* 72 Hun, 384.

² *Marshall v. Otto*, 59 Fed. Rep. 249.

³ *Dickerson v. Cass County Bank* (Iowa) 64 N. W. 395. Upon a mere formal motion to substitute one person for another, as receiver in an action, though it is founded by the notice upon the pleadings, decree, and proceedings in the action, as well as upon affidavits, the opposing party cannot question the regularity of the original order appointing such receiver, or the proceedings generally. *Fassett v. Tullmadge*, 13 Abb. Pr. 12.

⁴ The employment of the judgment debtor, by his receiver, to collect a portion of the assigned demands, is not alone sufficient to require his removal from his trust. *Ross v. Bridge*, 15 Abb. Pr. 150, 24 How. Pr. 163.

counsel for the receiver,¹ nor is relationship,² nor mere disagreement between joint receivers,³ nor a new election of officers.⁴ But the lack of assets in the receiver's hands sufficient to pay his compensation is not ground for refusal to discharge.⁵ He cannot be retained merely to enable the debtor to effect a settlement with his creditors.⁶

¹ The fact that the counsel for the plaintiff has sometimes acted as counsel for the receiver is no ground for removing the receiver. *Bank of Monroe v. Schermerhorn*, 1 Clarke Ch. 366.

² Relationship to a party is not alone a sufficient ground for the removal of a receiver; at most, it is but a circumstance to be taken into consideration at the time of making the appointment. *Wetter v. Schlieper*, 7 Abb. Pr. 93.

³ A and B were appointed joint receivers, under a stipulation, in an action for a dissolution of partnership. They subsequently applied for the appointment of a new receiver in their place on the ground that the joint receivers could not agree as to the manner of carrying out their trust, from a conflict of interest and incompatibility of temper. It was shown that the fund was in danger,—Held that these were not good grounds for removal and appointment prayed for, the facts upon which the relief was asked being known to the parties who made the stipulation. *Comer v. Belden*, 8 Daly, 257.

⁴ After the corporation has been placed in the hands of a receiver, a new election of officers ordered by court will not of itself revoke the authority of the receiver. *Keokuk N. L. Packet Co. v. Davidson*, 18 Mo. App. 561.

⁵ Upon an application by parties interested for the discharge of a receiver, and one by the receiver for the adjustment of his compensation and allowance of his accounts, both heard together, the court may grant the discharge, and determine the matter of the compensation and accounts in a subsequent order. *Belmont Nail Co. v. Columbia Iron & S. Co.* 46 Fed. Rep. 8.

Where a receiver has no assets in his hands it is not error to discharge him upon the application of those at whose instance he was appointed, without making payment of his compensation and charges a condition precedent to the discharge. *Belmont Nail Co. v. Columbia Iron & S. Co. supra.*

A receiver cannot be retained merely to enable him to get assets into his hands from which to pay his compensation and charges. *Joslyn v. Athens Coach & C. Co.* 43 Minn. 584.

If he has no assets in his hands he may be discharged without compensation. *Joslyn v. Athens Coach & C. Co. supra.*

⁶ A receivership should not be continued and creditors enjoined from prosecuting their just claims for the purpose of allowing the debtor to effect a settlement with creditors. *Halpin v. Mutual Brew. Co.* 91 Hun, 220.

CHAPTER XIX.

CLAIMS AGAINST RECEIVERSHIP FUNDS.

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| § 340. Claims against receivership funds. | (b) Personal property tax. |
| (a) Receiver disinterested as between claimants. | (c) Surety not entitled when. |
| (b) Must pay parties named. | (d) Creditors holding collaterals. |
| (c) Proof of claims; order of court. | (e) Operating expenses. |
| (d) Validity of claims. | (f) Statutory liens. |
| § 341. Character of claims allowed. | (g) Judgment creditors' liens. |
| (a) Attorney and counsel fees. | § 342. Preferred claims; grounds for allowance. |
| | § 343. Nature of preferred claims. |

§ 340. Claims against receivership funds.

The claims presented to a receiver for allowance out of the receivership estate and funds are exceedingly numerous and varied in character, and the scope of discussion in this connection will not be extended beyond the briefest statement of the general rules applicable thereto, with a sufficient number of citations to illustrate the subject.

(a) The receiver's position of independence and impartiality between all parties in interest, renders it imperative that as to all claimants he shall remain disinterested as between them. He has no discretion as to the general application of the funds, and holds them strictly subject to the order of the court, and he must not become interested in any claim presented for allowance from the funds in his hands.¹

¹ Receiver may not purchase property connected with the subject matter of his receivership. *Herrick v. Miller*, 128 Ind. 304.

He has no discretion in general in the application of funds in his hands, but holds strictly subject to the order of court. When ordered to pay a claim he cannot offset a claim due him personally. *Herrick v. Miller, supra*.

An act of receiver in acquiring title

to property in his hands is absolutely void. *Herrick v. Miller, supra*.

It is no part of his duty to adjust the accounts. *Moreton v. Harley*, 3 W. & W. (E.) 74, 79.

Claims presented to the court against a fund or property in the hands of a receiver are properly referred to him, to ascertain whether they are just. *Litsenberger v. Jarvis-Conklin Trust Co.* 8 Utah, 15.

It is the duty of receivers of a cor-

(b) He must pay to the parties named in the order of distribution, or those authorized by power of attorney to receipt for them.'

(c) The court by an order may require all creditors to prove their claims before the receiver, or other person designated, within a period specified, and as a rule those failing to make such proof are debarred from participating in the distribution,' unless

poration appointed under the statute to allow only such claims as are legal and just and which might have been recovered against the corporation, either at law or in equity. *Atty. Gen. v. Life & F. Ins. Co.* 4 Paige, 224.

A receiver will not be permitted to contest a single claim merely on account of his personal interest in it. *Stanton v. Andrews*, 18 Ill App. 552.

One class of creditors cannot be wholly or partially excluded from their proportionate share of assets by reason of previous payments made before appointment of receiver. *People v. Universal L. Ins. Co.* 42 Hun, 616; *People v. Knickerbocker L. Ins. Co.* 101 N. Y. 636, distinguished.

Failure of a creditor of an insolvent bank to verify a claim presented to the receiver will not bar the right to sue on the claim in the absence of a statutory requirement that the claim shall be verified. *Arnold v. Penn* (Tex. Civ. App.) 32 S. W. 358.

¹ A receiver is only justified in paying money to the person named in the order or on his power of attorney. An attorney has no power to receipt for money due his client without express authority. *Re Brown's Estate*, L. R. 19 Ir. 183.

A receiver has no right to pay money to anyone except the persons named, as no one else can give a discharge. The payment to a solicitor of the party entitled is not allowed, and the receiver must account for it. *Ind v. Kidd*, 63 L. J. Q. B. 726.

Where he pays out money in obedience to the order of court to parties not entitled to it he will be protected and not compelled to make restitution. *Willis v. Sharp*, 124 N. Y. 406.

² A creditor failing to prove his claim in the time specified is debarred from dividends. R. I. Rev. Stat. chap. 237, § 13.

Re Eddy, 15 R. I. 474. But court may extend time. *Id.*

An order of a Federal court which has appointed a receiver of a corporation, that persons holding claims against the receiver must present them by intervention in that court, is void as an attempt to destroy the right to sue and establish them in any court having jurisdiction, in violation of the act of Congress of March 3, 1887. *Texas & P. R. Co. v. Watts* (Tex.) 18 S. W. 312; *Texas P. R. Co. v. Johnson*, 76 Tex. 421.

The claim of a creditor of a corporation which has been dissolved, and whose assets have been placed in the hands of permanent receivers, should be paid if the receivers have sufficient assets in their hands, though the time to prove debts against the estate has expired. *People v. Remington*, 59 Hun, 282, Aff'd in 126 N. Y. 654, mem.

The receiver of an insolvent corporation having funds in his hands must pay in full the royalties on patented articles manufactured by such company under contract to pay royalties on each of such articles

there are such special circumstances as render the application of the rule unjust and inequitable.

(d) The method of determining the validity of claims against the receivership fund is usually determined in the suit in which

manufactured and sold, when the articles have been sold by him after his appointment; but for such articles as were sold before his appointment the royalties become a general debt of the corporation. *People v. Remington, supra*.

Land wrongfully taken possession of by a receiver and returned to the corporation after the receiver's discharge, is unaffected by the notice of the receiver to prove claims. *Bloomfield v. Van Slike*, 107 Ind. 480.

Although the better practice is for the judge or court appointing a receiver for a railroad to fix, at the time, as a condition, what debts and liabilities shall be made a charge on the property and paid by him, such an order may be made afterwards. *Central Trust Co. v. St. Louis, A. & T. R. Co.* 41 Fed. Rep. 551.

The receiver of a mutual benefit society is not authorized to allow claims presented after the expiration of the time fixed by the court for the presentation of claims; but if there are such special circumstances as, in his opinion, make it just that such claims should be allowed, and they will not delay the distribution of the assets, he may make special application to a single justice, setting forth such circumstances. *Fogg v. Supreme Lodge, U. O. of G. L.* 159 Mass. 9.

The court will allow a claim to be presented to a receiver of an insolvent corporation for an investigation of its merits, after the time limited by order for the presentation of claims, where before the expiration of such time suit was brought on claim against the receiver, during the pendency of which

negotiations for a settlement were entered into with a committee of creditors having charge of the reorganization of the corporate business and with which the receiver was in constant communication and co-operation, and claimant was confident that a satisfactory settlement would be made, and the assets are still in the receiver's hands, and no embarrassment will result in the administration of the trust against which the receiver should not have provided. *Wall v. Young* (N. J. Ch.) 23 Atl. 526.

When a receiver has no actual notice of a petitioner's claim, before making the second dividend, and has reserved no fund applicable specifically to the payment thereof, it is error to require him to pay such petitioner his proportion of such dividend. *Smith v. Manhattan Ins. Co.* 4 Hun, 127.

Where a receiver appointed on the dissolution of a corporation advertised for claims, and made personal service of notice to present claims upon the plaintiff in a pending action against the corporation, but who presented no claim, the latter could not, after the receiver duly distributed the assets reserving only sufficient to meet the expenses, by making the receiver a party to his action, cast on the latter the cost of the litigation. *Owen v. Kellogg*, 56 Hun, 455.

Where railroad property is in the hands of a receiver, an order for repairs, to be paid for by certificates of indebtedness constituting a first lien on the road, can only be made on motion after a proper investigation and hearing. *Ex parte Mitchell*, 12 S. C. 83.

the receiver is appointed, but the court may exercise a discretion in this matter.¹

¹ It is within the discretion of the court, either to determine claims against a receiver by petitions in the original action in which he was appointed or by an independent suit. *Blake v. State Sav. Bank*, 12 Wash. 619.

An application by the assignee of a certificate of sale under foreclosure, for the appointment of a receiver to collect rents and profits and apply the same to the payment of mortgages, may be amended by setting up facts entitling the plaintiff to the relief sought, after the reversal of an order appointing such receiver, although the period of redemption has expired in the meantime, where there is a controversy between the plaintiff and the mortgagor over the amount in the hands of the receiver. *Stoffel v. Sellers*, 142 Ind. 801.

A subsequent recognition by the chancellor, of attachment levies and the lien created thereby on property in the hands of the receiver, is equivalent to previous permission to make them, and may render such levies valid. *Ex parte Tillman*, 98 Ala. 101.

A proceeding by the receiver of a corporation dissolved in voluntary proceedings for the appointment by consent of a referee to try a claim rejected by the receiver, is not a "motion" within N. Y. Laws 1888, chap. 878, § 8, requiring a copy of all motions in proceedings for the dissolution of a corporation or distribution of its assets to be served on the attorney general. *People v. American S. B. Ins. Co.* 14 Misc. 162.

Where money is placed in the hands of a receiver pending the litigation, the court may, on the decision of the cause, direct its application on mo-

tion. But the court cannot act in this summary manner where money has been paid over to the defendant in satisfaction of an execution, by order of the judge granting the injunction according to the prayer of the bill. If in such a case the injunction bond did not afford an adequate remedy, a suit in chancery where the rights of all the parties could be adjusted would be the proper course. *Bank of Mobile v. Planters' & M. Bank*, 1 Ala. 109.

A court of chancery having appointed a receiver of an insolvent corporation, and a person not a party to the suit having presented a petition setting up the right to possession of certain land in the possession of the receiver as such, praying the court to adjudicate upon his rights and to direct the receiver to deliver possession to him, it will, in the absence of any claim of right of possession on the part of any other party not before the court, hear and determine the petitioner's claim, although it is one within the jurisdiction of a court of law. *Smith v. Perth Amboy Brick Co.* 47 N. J. Eq. 442.

One not a party to a chancery suit, but with whom a receiver appointed therein, with the consent of all the parties, contracted a lawful debt in the management of the property in controversy, may during the pendency of the suit and after the decree restoring the property to complainant, but before the discharge of the receiver, petition the court to require the complainant to pay the debt due him, or that on his failure to do so the property be sold to pay such debt, as the decree of restoration does not deprive the court of authority to assume con-

§ 341. Character of claims allowed.

The claims usually allowed against a receiver and payable out of the funds in his hands which are subject to distribution embrace the following subjects:

(a) Attorney and counsel fees for services rendered to the receiver during the receivership, relating to the receivership property.¹

trol of the property for the purpose of enforcing claims upon it which are the result of the court's own orders or decrees. *Thornton v. Highland Ave. & B. R. Co.* 94 Ala. 353.

Where a receiver has not paid a claim which it is alleged comes within an order requiring him to pay it, and the question is presented to the court as to the liability of the property for the claim, the court is not foreclosed by the order, but may determine the extent of liability of the property to such claim, and what its rights of priority are. *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023.

When a receiver makes a settlement and compromise with a general assignee for the benefit of creditors of a corporation in another state which is ratified by the court, agreement becomes in equity a novation and the obligation is thenceforward a new one between the receiver and the assignee and such agreement cannot be attacked by attaching creditors. *Kimball v. Lee*, 40 N. J. Eq. 408.

A person not a party is not entitled on motion to obtain money from the receiver even if his debt is payable out of the funds in the receiver's hands. *Brocklebank v. East London R. Co.* L. R. 12 Ch. Div. 839.

¹ Counsel fees are proper allowances to receiver for counsel employed by him in the discharge of his duties; though it is discretionary. *Stuart v. Boulware*, 183 U. S. 78, 33 L. ed.

568; *Internal Improv. Fund v. Greenough*, 105 U. S. 527, 26 L. ed. 1157. The fees are determined by the circumstances of such case, corresponding with the degree of responsibility and business ability required. *Internal Improv. Fund v. Greenough*, *supra*.

Services rendered by an attorney, for an individual, in conducting proceedings against an insolvent insurance company, the proceedings having for their purpose the protection of the general fund for the benefit of all concerned, are properly paid for from the assets in the receiver's hands. *Atty. Gen. v. Continental L. Ins. Co.* 62 How. Pr. 130.

A receiver is not entitled in his account to a credit for attorney's fees paid by him for either of the partners; but if, on his final settlement, there are sufficient funds in court belonging to the partner for whom he has paid, the court may order him to be paid from them. *Drake v. Thyng*, 37 Ark. 228.

Services of an attorney employed by the receiver of a railroad in reducing the claim of a lienor subject to whose lien the road was sold, not being to keep the road a going concern, are not entitled to priority in funds in the hands of a receiver of the company which purchased the road, over mortgages executed by it, although the claim therefor was recognized by such company. *Bound v. South Carolina R. Co.* 51 Fed. Rep. 58.

Just claims of employees of a street

(b) Personal property taxes assessed against the receivership property maturing while in the receiver's possession or constituting a lien thereon when it comes into his possession.¹

railroad company for services rendered in operating the road within ninety days prior to the appointment of a receiver are properly given precedence in payment to a mortgage upon the road. *Litzenberger v. Jarvis-Conklin Trust Co.* 8 Utah, 15.

An attorney's claim against a railroad company cannot be ordered paid out of the earnings in the hands of a receiver, or out of the first proceeds of sale under a mortgage, at least in advance of a final decree, although he has a lien on deeds of the right of way and also has the legal title to depot sites for which he has procured deeds. *Pennsylvania Finance Co. v. Charleston, C. & O. R. Co.* 46 Fed. Rep. 426.

A receiver should not be permitted to pay large sums to counsel for alleged services, without making the nature and value of the services apparent. *Re Commonwealth F. Ins. Co.* 32 Hun, 78.

A general solicitor employed by the two receivers of a railway company at a specified annual salary has no claim for services rendered by him on the fund transferred to the company at the close of the receivership, where one of such receivers notified him before such services were performed that he had abolished the office of solicitor, and there is no order of court fixing a liability on the fund for such services or approving the action of the receivers in fixing it, and the claim was not acted upon in closing up the receivership. *International & G. N. R. Co. v. Herndon* (Tex. Civ. App.) 33 S. W. 377.

An allowance cannot be made for services of the attorneys of a corpora-

tion in resisting proceedings to appoint a receiver, where the officers of the company knew that it was insolvent and acted in bad faith, although the attorneys acted in good faith. *People v. Commercial Alliance L. Ins. Co.* 91 Hun, 889.

¹ A tax bill against personalty which has been in the hands of a receiver during the time within which a collector would otherwise have levied on it for taxes should be first paid from the proceeds. *George v. St. Louis Cable & W. R. Co.* 44 Fed. Rep. 117. Not so as to taxes on real estates.

A tax bill against realty in the hands of a receiver will not be paid out of the proceeds, where a sale of the property has been made "subject to all tax liens," as the state has a lien for a tax paramount to all other liens, and the bids are presumed to have been made with reference to that fact. *George v. St. Louis Cable & W. R. Co.* *supra*.

Under the Missouri statutes the state has a paramount right to be paid its taxes out of assets in the hands of a receiver, and may enforce such taxes by distress. Hence, where the court orders all claims to be presented to the receiver of a savings bank within a certain time, or they will be barred, it should order the receiver to pay assessed taxes upon application of the collector, although made after the time when other claims are barred. *Greeley v. Provident Sav. Bank*, 98 Mo. 458.

A receiver of a corporation will not be directed, before final accounting, to pay the corporation's personal tax, although he admits that he has sufficient funds, where there may be prior

(c) A surety who has not paid the debt for which he is liable as surety is not entitled to prove his claim.¹

(d) A creditor holding collateral security may prove his claim without first exhausting his collateral, or surrendering the same.²

(e) Operating expenses.³

(f) Statutory liens.⁴

(g) Judgment creditors' liens.⁵

§ 342. Preferred claims; grounds for allowance.

Where a mortgagee of a railroad asks the aid of a court to foreclose the lien, and for a receiver, the court in its discretion may require provision to be made for the payment of certain classes of outstanding claims, such as rentals, wages of laborers, etc., as a condition of issuing the order, from the income during the receivership. The reason for this requirement is that the

liens for wages of the corporation's employees. *Schenck v. Consumers' Coal Co.* 26 Abb. N. C. 356, distinguished from *Central Trust Co. v. New York City & N. R. Co.* 110 N. Y. 250, 1 L. R. A. 260; *Re Babcock*, 115 N. Y. 450.

¹ A surety who has not paid the debt cannot prove a claim against the receiver of a bank, where the debt has once been proved by the creditor. *Stewart v. Armstrong*, 56 Fed. Rep. 167.

Under the rule that net earnings, while property is in the possession of a receiver appointed by a court, may be applied to the payment of claims having superior equities to that of the bondholders,—Held, that if a balance of salary due the president of the road was a prior claim, he had waived it by the published annual report as such president, in which he had put his salary each year among the paid items. If his salary was not in fact paid he was only a general creditor. *Addison v. Lewis*, 75 Va. 701.

A claim of contractors for building

an extension of the road did not come within the rule. *Addison v. Lewis*, *supra*.

² A creditor of an insolvent corporation of which receivers are appointed is entitled to a dividend upon his claim without first exhausting collateral security held, or surrendering such security to the receivers to be added to the general fund for distribution. *Wheeler v. Walton & W. Co.* 72 Fed. Rep. 966.

³ See *post*, §§ 342, 348.

⁴ *Poland v. Lamoille Valley R. Co.* 52 Vt. 144; *Blair v. St. Louis, H. & K. R. Co.* 19 Fed. Rep. 861.

⁵ A judgment creditor is entitled to a priority as to income derived by the receiver from the operation of the road, or other money in his hands derived from the collection of debts due the corporation; and if the judgment is against the receiver for receivership indebtedness for operating expenses it may be paid out of the corpus also. *Gibert v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 645; *Turner v. Indianapolis, B. & W. R. Co.* 8 Biss. 527.

mortgagee in accepting his mortgage impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income.

In such case, if anything has been taken from the current debt fund and put into the mortgage creditors' fund, the court may require, as a condition of the order, that the future current receipts shall be applied to the payment of the current debts, before payment of anything to the mortgagees, and this notwithstanding the mortgage may give a lien on the profits and income.

So also if it appears in the progress of the case, where no order has been made touching the rights of such creditors, that interest has been paid, additional equipment provided, or lasting and valuable improvements made, out of the earnings that ought to have been applied in keeping down debts for labor, supplies, etc., it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of the funds, would have been paid in the ordinary course of business. Such an order in effect restores the parties to their original equitable rights.

And while the above rule is ordinarily restricted to the income of the receivership and the proceeds of mortgaged assets that have been taken from the company, yet the rule may be extended in certain cases to the proceeds of sale of the mortgaged property; as where, before the appointment of a receiver, income applicable to the payment of current debts is taken for permanent improvements in the fixed property or to buy additional equipment.¹

The reasons for these rules are that a railroad is a public con-

¹Mr. Justice Harlan, in *Thomas v. Peoria & R. I. R. Co.* 36 Fed. Rep. 808. Cf. *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Milttenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 236, 27 L. ed. 117; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434, 29 L. ed. 963; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596; *Union Trust Co. v. Morrison*, 125 U.

S. 591, 31 L. ed. 825; *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603, 23 L. ed. 405; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. ed. 144; *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694; *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163; *Pennsylvania Finance Co. v. Charleston, C. & O. R. Co.* 48 Fed. Rep. 188.

cern, and is operated and kept in motion for the benefit of stockholders, mortgage bondholders, and the public, all of which are interested in it as a going concern. The application of these equitable principles in favor of labor, supplies, etc., springs out of and depends upon the diversion, for if there has been no diversion—no taking of funds justly belonging to one class and applying them to another—there can be no application of the rule. If there are no earnings or insufficient earnings to meet expenses, and no diversion, then in such case this class of creditors have no equities as against the mortgage security, and are simple contract creditors.¹

This rule cannot be extended beyond the equitable claimants mentioned, and made to apply to unsecured creditors generally, for such application would be, in effect, confiscation.²

§ 343. Nature of preferred claims.

While it is true that debts contracted by a railroad corporation as a necessary part of its operating expenses, or for labor and supplies, or for necessary equipment or improvement of the mortgaged property, are privileged debts, entitled to be paid out of the current income after a mortgage trustee or a receiver is appointed in a foreclosure suit, as decided by the United States Supreme Court,³ yet the same court limited the above rule to the payment of supplies for the machinery department furnished before the appointment of the receiver, and refused to extend it to material furnished for construction purposes, as not based upon any special equity.⁴ This limitation of the rule does not apply of course where the construction is made by the receiver.⁵ As has

¹ *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596.

² Preference from the assets may be required as to meritorious debts contracted to create or preserve railroad property, as a condition of the appointment of a receiver in an action to foreclose a mortgage upon the railroad, although there has been no diversion of the income of the road. *Farmers' Loan & T. Co. v. Kansas*

City, W. & N. W. R. Co. 53 Fed. Rep. 182.

³ *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339.

⁴ *Hale v. Frost*, 99 U. S. 389, 25 L. ed. 419.

⁵ *Miltnerberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 287, 27 L. ed. 117; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 462, 29 L. ed. 973; *Huidekoper v. Hinckley Locomotive Works*, 99 U. S.

258, 25 L. ed. 345; *Wood v. Guarantee Trust & S. D. Co.* 128 U. S. 421, 32 L. ed. 473. Cf. *American Loan & T. Co. v. East & W. R. Co.* 46 Fed. Rep. 101; *Kneeland v. Bass Foundry & Mach. Works*, 140 U. S. 592, 35 L. ed. 543.

In *Milttenberger v. Logansport, O. & S. W. R. Co.* *supra*, the court says many circumstances exist which may make it necessary and indispensable to the business of the road, and the preservation of the property, for the receiver to pay existing debts of certain classes out of the earnings of the receivership, or even the corpus of the property under the order of court, but the discretion to do so should be exercised with very great care. The payment of such claims *prima facie* stands on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. The probable results of nonpayment should be taken into consideration, together with the interests and accommodation of the traveling public. Cf. *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672.

In *Milttenberger v. Logansport, O. & S. W. R. Co.* *supra*, the time limited in which the claims must have accrued to entitle them to priority was fixed at ninety days.

The mere lapse of more than six months between the times in which the claims for labor accrued and the appointment of a receiver, does not afford a sufficient reason for denying a priority to which they would otherwise be entitled. *McIlhenny v. Bing*, 80 Tex. 1. In this case claims for board furnished to laborers and operatives employed by the insolvent railroad company, under an understanding

between the company, the laborers, and boarding-house keepers and grocers, that the company was to retain a sufficient amount out of the wages of the laborers to pay their board, and was to pay the boarding-house keepers and the grocers, the company crediting the latter with the amounts, were treated as claims assigned to the holders and were entitled to priority over the bonded indebtedness.

The fact that the holder of claims for laborers' wages against an insolvent railroad company took indorsed notes of the company, was held not a waiver of the holder's right to priority of payment as against the bonded indebtedness, where in taking the indorsement there was no intention to waive the lien against the company.

Two claims against the company for coal furnished for the purpose of operating its road, one of which accrued a little more and the other a little less than six months prior to the appointment of a receiver, were given a priority over mortgage bonds.

Where a railroad has been placed in the hands of a receiver, wages of employees, eight months overdue, were ordered to be paid to such of said employees as were retained by the receiver in the employ of the road; but petitions by assignees of similar overdue wages for payment of the same were refused. *Skiddy v. Atlantic, M. & O. R. Co.* 8 Hughes, 320.

Where rails and supplies are furnished to a railroad company on its credit, before the appointment of a receiver, the court will refuse a petition for payment of the same. *Skiddy v. Atlantic, M. & O. R. Co.* *supra*.

Creditors of a railroad company in the hands of a receiver in a mortgage

been seen elsewhere, the claims which have priority over the mortgage indebtedness are usually for labor and supplies, but may include royalty to a mine owner,¹ receiver's certificates in the hands of innocent holders where on their face priority is expressed,² proper compensation to counsel,³ claims given a priority

foreclosure will be paid out of its earnings in preference to the mortgage only where it has been kept a going concern by materials, supplies, or equipment in part, at least, furnished by such creditors, and has made earnings which in whole or in part have been used in payment of interest or in permanent improvements, or in some other way for the benefit of the mortgage creditors. *Pennsylvania Finance Co. v. Charleston, C. & C. R. Co.* 48 Fed. Rep. 188.

A court which appoints a receiver of railroad property may contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien on the property itself. *Kneeland v. Bass Foundry & Mach. Works*, 140 U. S. 592, 35 L. ed. 543.

A court which is administering a railroad through a receiver will not be prevented from purchasing rolling stock and other material needed for its operation, by reason of agreement between a third party and the receiver and bondholders of the road that a claim of such third party is to have priority over all claims except operating expenses. *State v. East Line & R. R. Co.* (Tex. Dist. Ct.) 48 Am. & Eng. R. Cas. 656.

Indebtedness for necessary supplies for a railroad, which accrued before the appointment of a receiver, can seldom be allowed priority to the mortgage bonds. Claims for rental of cars, that accrued prior to the receivership, should not be; but claims for rental of cars which accrued dur-

ing the receivership and for ordinary repairs of such rented cars, rendered necessary by his use of the same, where he agreed to keep the cars in repair, should be allowed such priority. *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 668.

¹ Royalty accruing to a mine owner from an insolvent mining company while in the hands of a receiver is a first charge on the funds in his hands. *Allison v. Coal Creek & N. R. Coal Co.* 87 Tenn. 60.

² When receivers' certificates payable to bearer have all passed into the hands of third persons for a valuable consideration those persons have a right to rely on the promise of the court as to their priority, plainly borne on their face, when the consent of the trustees, and thus of the bondholders, was given to their issue. *Kneeland v. Luce*, 141 U. S. 491, 35 L. ed. 830.

The lien of receiver's certificate issued upon a loan to the receiver, under an order directing that they constitute a first lien on railroad property in the possession of the receiver, is not affected by a mortgage foreclosure of which the holder had no notice, or by the fact that the receiver misappropriated the money. *Mercantile Trust Co. v. Kanaoka & O. R. Co.* 50 Fed. Rep. 874.

³ A decree appointing a receiver for a railroad, and giving priority to claims for "labor in operation of the road,"—Held, to include proper compensation for counsel to the receiver for services necessary in managing the

by statute.¹ But claims will not be given a priority where they are collusive and detrimental to the trust, though for material,² or for general construction account sold on the credit of the company more than six months prior to the appointment,³ or for the death of an employee,⁴ or for services rendered to retain control of a portion of the road not covered by the mortgage,⁵ or balance due for compensation from a joint enterprise where the foreclos-

road. *Bayliss v. La Fayette, M. & B. R. Co.* 9 Biss. 90. Not however if he is employed for special purposes. *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023.

¹ Laborers in the employment of a corporation whose property is put into the hands of a receiver who takes immediate possession thereof, with whom they properly file their claims, are not required to file claims with a sheriff who had levied upon all such property four days before the appointment of the receiver, under Iowa Acts, 23d Gen. Assem. chap. 48, giving a preference to the laborers of a corporation whose property is seized or put into the hands of a receiver, and requiring them to file such claim with the officer seizing the property or with the receiver. *St. Paul Title Ins. & T. Co. v. Diagonal Coal Co. (Iowa)* 64 N. W. 606.

Past-due instalments upon agreements for the hire of rolling-stock are "working expenses and proper outgoings," to be first paid by the receiver of a railroad company out of the gross receipts. *Re Eastern & M. R. Co.* 45 Am. & Eng. R. Cas. 71, L. R. 45 Ch. Div. 367.

² *Vanderbilt v. New Jersey C. R. Co.* 43 N. J. Eq. 669.

³ One who sells materials to a railroad company for general construction, relying on the credit of the company and obtaining no lien on its earnings or property more than six months prior to any receivership, has no preference for payment out of the

funds in the hands of the receiver as to mortgage creditors. *American Loan & T. Co. v. East & W. R. Co.* 46 Fed. Rep. 101.

One who has sold necessary rails in reliance upon the promise of the company's officers that they should be paid for out of the earnings is entitled, in equity, to be paid out of the earnings in the hands of a receiver, appointed in a foreclosure suit by the second mortgagees, in preference to the latter's claims, but not to those of first mortgagees and other lienors superior to the second mortgage, who have only come into equity by cross-bills after being made defendants. *Bound v. South Carolina R. Co.* 47 Fed. Rep. 80.

⁴ Liability for the death of an employee is not included in the operating expenses of a railroad during the period of six months before a receivership, so as to have preference over a mortgage upon foreclosure. *Farmers' Loan & T. Co. v. Green Bay, W. & St. P. R. Co.* 45 Fed. Rep. 664; *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 832.

⁵ Services rendered at the instance of a railroad company to preserve control of that portion of its road not covered by a first lien cannot be considered as services to the holders of bonds secured by that lien, so as to be entitled to be paid by their receiver. *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023.

ure is on one,¹ or money loaned to the company,² or rent for leased lines of road not part of an entire railroad system,³ or personal injuries,⁴ or fire produced by a defective locomotive.⁵

¹ Where two railroad companies had the same fiscal agent, who received the earnings of both, from which payments were made for each, an account being kept between them, a balance of such account in favor of one company is not entitled to priority of payment from the proceeds of the foreclosure of a prior mortgage on the other, in preference to the mortgage bondholders. *Morgan's Louisiana & T. R. & S. S. Co. v. Texas C. R. Co.* 187 U. S. 171, 84 L. ed. 625; *Penn. v. Calhoun*, 121 U. S. 251, 80 L. ed. 915; *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 84 L. ed. 379; *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 832.

² One who has loaned money upon corporate shares, but has not had them transferred to his name on the books of the company until after the death of the debtor and after a receiver of his estate has been appointed at the instance of a creditor, is not entitled to have transferred to him by the receiver debentures issued to the latter by the company representing arrears of dividends upon the stock, since the receiver occupies the position of an executor and the debentures are assets in his hands. *Re Hoare* [1892] 8 Ch. 94.

Morgan's Louisiana & T. R. & S. S. Co. v. Texas C. R. Co. 187 U. S. 171, 34 L. ed. 625.

³ For the use of leased lines which came into the hands of the receiver of a railroad company (who is appointed on its own petition) as part of its own road, being subject to a general mortgage under the clause covering "after-acquired property," neither the agreed

rental nor the net earnings of such lines during the time they are in the receiver's possession as part of the entire railroad system can be claimed by creditors of such lines in preference to the general mortgage creditors, although the trustee of the former might, under sanction of the court, have terminated the right of the receiver by demanding possession. *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 46 Fed. Rep. 26.

⁴ A person receiving personal injuries for which a judgment had been rendered against the mortgagor railroad company for wrong committed before the appointment of a receiver is a general creditor and the earnings of the receivership need not be applied first to the payment of these judgments. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 30 Fed. Rep. 895.

It is error to direct a receiver to pay debts out of property in his hands, even if they are entitled to priority of payment, until the claims are reported by a commissioner and allowed by the court. *Penn. v. Whitehead*, 12 Gratt. 74.

See further as to preferred liens, *ante*, chap. XIV.

⁵ Damages to property by sparks from a defective locomotive prior to the appointment of a receiver in foreclosure proceedings, though subsequent to the default of the company on the mortgage,—Held, not to come under the head of operating expenses, to be paid from the earnings in the hands of the receiver. *Hiles v. Cass*, 9 Biss. 549.

§ 344. Where the statute creates a lien in favor of laborers or supply men it will be entitled to a priority over the mortgage lien in a foreclosure proceeding.¹

¹ See *ante*, § 276 (d).

CHAPTER XX.

RECEIVERS' COMPENSATION.

§ 350. Compensation.

- (a) Must be reasonable.
- (b) Fixed on commission basis, percentage.
- (c) Sometimes a salary.
- (d) When compensation refused.

- (e) When to be paid by plaintiff.
- (f) Does not depend on result of litigation.
- (g) Priority of payment of.
- (h) Additional allowances.
- (i) Statutory compensation.
- (j) Order fixing not revoked.

§ 350. Compensation.

In regard to the compensation to be allowed to a receiver, there are no uniform rules established of universal application. Nor is this at all strange since the duties to be performed by receivers are so varied and the responsibilities attaching to the office so different under the peculiar circumstances of the many cases that arise. The following are some of the most general rules guiding the courts in fixing the compensation of receivers.

(a) The compensation must be reasonable, and its reasonableness depends upon a number of elements, such as the time and labor actually expended, the fair value of such time and labor to be fixed by common business standards, the degree of industry and dispatch with which the work is conducted, the compensation ordinarily paid for the transaction of similar business to persons capable of so doing, the responsibilities attaching to the particular office in each case.¹

¹ Courts of equity may, in the absence of statutory rule, fix the compensation of their own receivers and that of counsel employed by them. *Stuart v. Boulware*, 183 U. S. 78, 83 L. ed. 568.

The reasonableness of the compensation of a receiver is exclusively for the determination of the court. *Lichtenstein v. Dial*, 68 Miss. 54.

An allowance of 4% as compensation to a receiver is not unreasonable, where three reputable members of the

bar testify that 3½ or 4% would be a proper compensation, even though a competent person could have been employed by private contract for less amount. The particular facts and duties and responsibilities should guide. *Lichtenstein v. Dial*, *supra*.

In the absence of a statute, the court may allow reasonable compensation; and the order therefor is final and appealable, and is special, not governed by the general statute of appeals. *Martin v. Martin*, 14 Or. 165.

Notwithstanding the statute authorizing the superintendent of the insurance department to fix the compensation of receivers of insolvent life insurance companies, the court will supervise the decision of the superintendent; especially where the superintendent fixes a rate of allowance before the completion of the services. *Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 94.

The compensation of a receiver should be such as would be reasonable for the services rendered by a person competent to perform the duty, rather than any fixed commission. *Jones v. Keen*, 115 Mass. 170.

The settled rule of the courts to allow to trustees only the same commissions as the statute allows to executors and guardians for similar services, is not applicable to receivers appointed by the court in actions pending therein. So held of a receiver to receive and apply rents pending a controversy arising on the probate of a will. The court by whom a receiver is appointed has power to determine the rate of compensation and it may be fixed with reference to the circumstances of the case. *Gardiner v. Tyler*, 2 Abb. App. Dec. 247.

A receiver of an insolvent savings bank was allowed compensation for his services to be fixed by considering the responsibility assumed, the skill and labor expended, and the rate of pay usually allowed for similar work; and not to be determined by a percentage on collections and for commissions for services rendered by him as broker in raising money for mortgage debtors to the bank to enable them to discharge their debts. But a gratuity he had paid to a policeman for assisting in keeping order during dividend payments was disallowed. *Special Bank Comrs. v. Franklin Sav. Inst.* 11 R. I. 557.

A receiver acting on a fixed compensation as the agent of creditors and subsequently remaining in charge after its purchase by the creditors with the power to sell, acquires no lien upon the property or its proceeds for his compensation and a settlement between the creditors releasing the fund derived from the sale revokes his agency. *Ross v. Rand*, 111 Ind. 206.

The compensation of a receiver of an insolvent railroad company is to be regulated by his responsibilities and duties. *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 32 Fed. Rep. 187. See *Hinckley v. Gilman, C. & S. R. Co.* 100 U. S. 153, 25 L. ed. 591; *Internal Improv. Fund v. Greenough*, 105 U. S. 527, 26 L. ed. 1157.

A court should not, without evidence as to proper compensation in a given case, determine and award the compensation to be paid to a receiver. *Heffron v. Rice*, 40 Ill. App. 244.

Where a receiver resigns to suit his own convenience, his compensation may fairly be measured by moneys actually received by him, although he has rendered services toward the collection of other moneys that will be received by his successor, who will be entitled to claim commission on their collection. *People v. Mutual Ben. Asso.* 39 Hun, 49; *Re Commonwealth F. Ins. Co.* 32 Hun, 78; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 32 Fed. Rep. 187.

The true rule in fixing the compensation of a receiver is to look at all the circumstances of the case, the amount of property to be cared for, the difficulty in reducing to possession, the kind and character of the property, the amount of bond required, the business character, and integrity required for the work, and finally, the manner in which the trust has been executed,—and then say

(b) The court sometimes, by statute or by analogy, fixes the compensation by a per cent on the amount of money passing through the receiver's hands. In many cases this is an equitable method of arriving at a just compensation, particularly in cases of bank receiverships, and other corporations of a somewhat similar nature.¹

what would be a fair and reasonable allowance, keeping in mind that the "laborer is worthy of his hire," and that extravagance is to be avoided. *United States v. Church of Jesus Christ of L. D. S.* 6 Utah, 9, 43.

The compensation of a receiver into whose hands property of the aggregate value of more than \$700,000 came, of which more than one third was in real estate, while the cash and other personal property was acquired with but little litigation, and his active duties, for the most part, ceased at the entering of a final decree in a suit,— was fixed for one year at \$10,000. *United States v. Church of Jesus Christ of L. D. S. supra.*

A receiver of a decedent's estate, whose application for an order to sell land to pay legacies and debts is entertained, is entitled to a reasonable fee for his services, which should not be estimated, however, by the charges usually made for obtaining such orders, where the court has required its register, at the expense of the estate, to ascertain and report all claims against the estate and the receiver's inventory of the assets is before the court. *Henry v. Henry*, 103 Ala. 582.

The appointment of a receiver of an insolvent corporation in one court while proceedings for such appointment are pending in another court having jurisdiction thereof, although irregular, is not void, and the receiver's lawful acts and contracts are binding in the further administration of the assets, and he is entitled to just

compensation for his services. *Northwestern Iron Co. v. Lehigh Coal & I. Co.* (Wis.) 66 N. W. 515. Cf. *Schwartz v. Keystone Oil Co.* 153 Pa. 283; *Central Trust Co. v. Cincinnati, I. & M. R. Co.* 58 Fed. Rep. 500.

An appellate court will not reverse the lower court as to compensation except in a strong case. *Heffron v. Rice*, 149 Ill. 216; *Morgan v. Hardee*, 71 Ga. 736.

¹ A receiver appointed to take the rents and profits of plantations, will be entitled to his commission of 5 per cent upon the performance of his duties, however unimportant they may be, and though the plantations have been managed solely by overseers appointed by him. *Price v. White*, 1 Ball. Eq. 240.

A receiver is an officer of the court, and as such, in the absence of legislation, the court has the authority to determine his compensation. The general mode of compensation is by a commission on the receipts and disbursements. *Mages v. Cooperthwaite*, 10 Ala. 966.

Five per cent on receipts and 2½ per cent on disbursements is correct, as a general rule. *Mages v. Cooperthwaite, supra.*

A receiver is entitled to commission on personal property which he transfers *in specie*; and where he pays money into the hands of a moneyed corporation named in the decree, he cannot make annual or any rests, but his commissions will be estimated on the sum total of the payments so

made. A receiver may retain counsel of one of the parties, to aid in securing a fund for the benefit of all parties. *Bennett v. Chapin*, 3 Sandf. 678.

A receiver of a life insurance company,—Held, not entitled to commissions on the amount (\$398,028.80) of premium notes and loans on policies outstanding at the time of his appointment, and carried on his books as liens on his policies, and not collected; the amount due on each policy being ascertained by deducting the loans or premium notes standing against it, and the difference treated as a debt due the company, on which dividends were computed by him. *Atty. Gen. v. North American L. Ins. Co.* 26 Hun, 294, 89 N. Y. 94; *Re Security Life Ins. & A. Co.* 31 Hun, 36.

Such receiver having advanced moneys to be used in paying off taxes on lands covered by mortgages belonging to a special fund in the hands of the insurance superintendent, and then in process of foreclosure,—Held that he was not entitled to commissions on these moneys, which were afterwards repaid to him on a sale of the property. *Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 94.

Commissions may be allowed the receiver, by such superintendent, on the special fund held by him for the company, and paid over to the receiver, as well as on the general assets. Such fund is also chargeable with its proportionate part of the expense of closing up the business. *Atty. Gen. v. North American L. Ins. Co. supra.*

All parties interested in the fund are entitled to notice of application to fix the commissions. The court may review such superintendent's action in fixing the receiver's commissions. *Atty. Gen. v. North American L. Ins. Co. supra.*

Owing to a disagreement as to the management of the affairs of a solvent corporation, a receiver was appointed. Those conducting the business continued to conduct it, buying and selling, receiving and disbursing. The receiver employed a clerk, whose compensation was agreed upon and allowed, and who reported daily to the receiver, who visited the factory nearly every day. The only money which actually came into the hands of the receiver was that arising from the final sale at auction of the property. Held that the receiver was entitled to commissions only upon this amount, not upon that received and disbursed by the managers. *Re Woven Tape Skirt Co.* 85 N. Y. 506.

Proceeds of security deposited with the superintendent of the insurance department as a special fund to secure registered policies are assets in the hands of the receiver of an insolvent life insurance company, and he is entitled to commissions thereon. He is not, however, entitled to commissions on premium notes and loans made on policies, such being merely offsets against liabilities. *Re Woven Tape Skirt Co. supra*; *Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 94.

A receiver of a copartnership is entitled to commission and expenses out of the proceeds of book accounts of the firm collected by him, although they were assigned to a creditor before his appointment, and he was notified not to collect them. *Kerlin v. Ewen*, 149 Pa. 58; *Schwartz v. Keystone Oil Co.* 153 Pa. 283.

Prior to the passage of N. Y. Laws 1838, chap. 378, the commissions of a receiver of an insolvent life insurance company were properly fixed by the court which appointed him, not exceeding, however, 5 per cent on receipts and disbursements. *Atty. Gen. v. Guardian L. Ins. Co.* 93 N. Y. 631.

(c) Sometimes the court fixes the compensation by a fixed salary by the year or month, but in such case the reasonableness is determined as in other cases, and it may be graduated according to the duties performed in certain stages of the receivership.¹

The 5 per cent upon receipts usually allowed to a receiver will be increased where unusual work is required, or diminished where the receipts are large or the trouble of collecting them is insignificant. *Hall v. Slipp*, 1 N. B. Eq. 87.

A receiver does not lose his right to commissions for carrying on the business at a loss after he knows that a loss will accrue, where no party interested applies for an order requiring him to close up the business. *Wilkins v. Adams*, 60 Ill. App. 410.

Cf. *Greeley v. Provident Sav. Bank*, 108 Mo. 212; *McArthur v. Montclair R. Co.* 27 N. J. Eq. 77; *Grant v. Bryant*, 101 Mass. 567; *Karn v. Rorer Iron Co.* 86 Va. 754.

¹ An allowance to a receiver of a lumber company for compensation for his services in settling and collecting accounts, operating a sawmill for two or three months, selling lumber and stock of merchandise, and looking after litigations, of \$450 for the first month, \$400 a month for the next five months, and \$300 a month thereafter, was reduced to \$300 a month for the whole time, in analogy to prices theretofore paid for carrying on the business and prices paid for similar work, but was not restricted to the compensation of executors and administrators. *Thompson v. Huron Lumber Co.* 5 Wash. 527.

A salary of \$8,000 per annum is inadequate compensation for a receiver who is called upon to manage the repairs, preservation, and operation of a long line of railroad, and who disburses in the period of twenty-seven and one half months \$1,700,000, and

gives bond in the sum of \$50,000. *Farmers' Loan & T. Co. v. Central R. Co.* 2 McCrary, 818.

But if a person agrees to serve for \$8,000 per annum, and enters upon duty under an appointment fixing his salary at that sum, a court of equity will not release him from that agreement and add to his compensation unless it be shown that his duties proved to be more arduous than he or the court expected, or that he performed duties in addition to those ordinarily required of a receiver. *Farmers' Loan & T. Co. v. Central R. Co. supra.*

A receiver is not entitled to extra pay for uniting the offices of auditor and cashier, thus saving one salary; nor for the disbursement of money in payment of debts contracted by his predecessor, and the like. *Farmers' Loan & T. Co. v. Central R. Co. supra.*

To deprive a receiver of all compensation on account of fraud or misconduct, it must appear that his action has been wilfully corrupt. An error of judgment is not enough. *Farmers' Loan & T. Co. v. Central R. Co. supra.*

A receiver appointed to examine the affairs of a savings bank,—Held, to be entitled to \$16,000 for services for three years and fourteen days. *Special Bank Comrs. v. Cranston Sav. Bank*, 12 R. I. 497.

Cf. *Pilkington v. Baker*, 24 Week. Rep. 284.

As to the compensation of an official liquidator being paid before the costs of winding up a corporation, see *Re Massey*, L. R. 9 Eq. 367; *Re Dronfield S. Coal Co.* L. R. 23 Ch. Div. 511.

(d) Circumstances sometimes may be such as to warrant the court in refusing compensation to the receiver, as where he neglects his official duty resulting in loss to the estate,¹ or is a party to the proceeding and interested in the property,² or is a trustee of the property.³

(e) A receiver will not be required to serve without compensation, and if the order is revoked after his services have been commenced, as having been erroneously granted, the party procuring the appointment must pay the compensation,⁴ or where it ap-

¹ Neglect and misconduct on the part of a receiver in the discharge of his trust will deprive him of the right to commissions by way of compensation. *Clapp v. Clapp*, 49 Hun, 195; *Schwartz v. Keystone Oil Co.* 153 Pa. 268.

Cf. *White v. Lincoln*, 8 Ves. Jr. 371; *Potts v. Leighton*, 15 Ves. Jr. 273; *Bristow v. Needham*, 9 Jur. N. S. 1168; *Dease v. O'Reilly*, 2 Con. & L. 441; *Flood v. Aldborough*, 8 Ir. Eq. 108; *Farmers' Loan & T. Co. v. Central R. Co.* 8 Fed. Rep. 60. But see *Coudrey v. Galveston, H. & H. R. Co.* 1 Woods, 331.

² A partner or co-owner who is appointed receiver on his own *ex parte* application, is not entitled to compensation for his services. *Brien v. Harriman*, 1 Tenn. Ch. 467.

A receiver who is an interested party appointed by agreement of the parties on a representation to the court that the salary of the former receiver would thereby be saved, and who made no claim for compensation while in office, will not be allowed any salary, although when he took the place he thought the estate would soon be settled up without much labor, but was disappointed in this respect, and the court had no notice of the expectation. *Steel v. Holladay*, 19 Or. 517.

A second mortgagee improperly appointed receiver of the rents and

profits of the mortgaged property under a first mortgage is not entitled to compensation for services in harvesting and marketing the crops, and to have the remainder of the moneys realized applied upon his debt, as such moneys represent the earnings of the property during the time the mortgagor was entitled to possession under the Oregon statute, and equitably belong to him. *Thomson v. Shirley*, 69 Fed. Rep. 484.

³ There is no inflexible rule that a trustee can be appointed receiver only upon the condition of receiving no remuneration, but the question is within the discretion of the court. *Re Bignell* [1892] 1 Ch. 59.

The fact that the order appointing a receiver provides for no remuneration does not preclude the court from granting remuneration. *Bignell v. Chapman* [1892] 1 Ch. 59, 61 L. J. Ch. 334, 66 L. T. 36, 40 Week. Rep. 305.

⁴ *French v. Gifford*, 31 Iowa, 428; *Pittsfield Nat. Bank v. Bayne*, 140 N. Y. 321; *Ferguson v. Dent*, 46 Fed. Rep. 88; *Morse v. Hannibal & St. J. R. Co.* 72 Mo. 585.

As a rule the compensation of a receiver is taxable to the fund and not to the parties to the suit and where the appointment is mutually agreed upon and no additional expense is incurred by it the mere fact that it was

pears that the property belongs to third parties who intervene, and not to the defendant.

(f) As a rule the receiver's compensation will not be made to depend upon the result of the litigation between the parties, and even where in the end the title to the property is found to be in the defendant from whom the receiver takes it, nevertheless he is entitled to compensation. The court in such case is not to blame, nor is the receiver who obeys its order, and the property in the receiver's hands is liable for his compensation,¹ and where the property has been turned over to third parties as the owners the court may order the property back into the receiver's hands for the purposes of compensation.²

(g) The receiver is entitled to compensation in priority to receiver's certificates or claims of laborers.³

made upon the petition of one party does not authorize the taxation of compensation to such petitioner. *Jaffray v. Raab*, 72 Iowa, 335.

Where at plaintiff's instance defendant is enjoined from prosecuting his business and dispossessed, pending the suit, of his property, which is turned over to a receiver, if he ultimately prevails the receiver's compensation should ordinarily be taxed as costs against plaintiff and not allowed from the fund. *St. Louis v. St. Louis Gaslight Co.* 11 Mo. App. 237. But see *People v. Jones*, 33 Mich. 303; *Tome v. King*, 64 Md. 166.

As a rule the compensation is payable from the receivership funds or property. *Wilson Cotton Mills v. Randleman Cotton Mills*, 115 N. C. 478; *Heise v. Starr*, 44 Ill. App. 406; *Beckwith v. Carroll*, 56 Ala. 12; *Pennsylvania Co. for Ins. on Lives, etc. v. Jacksonville, T. & K. W. R. Co.* 66 Fed. Rep. 431.

¹ A receiver is entitled to compensation from the fund in his hands, without regard to the result of the litigation. *Hopfensack v. Hopfensack*, 61 How. Pr. 496.

Cf. *Radford v. Folsom*, 53 Iowa, 276.

A receiver of property in controversy in an action cannot recover judgment for his services against all the parties, by motion in the original suit. He is an officer of the court and his compensation should be allowed out of the property in his hands, or taxed as costs. *Hutchinson v. Hampton*, 1 Mont. 39.

² Surrender to a third party of property which the court has placed in the hands of a receiver for preservation will not destroy a lien which the court has decreed against it for the payment of the receiver's fees; but the court may order the property, or the funds into which it has been turned, restored to the possession of the court so that it may be subjected to the satisfaction of such lien. *Lammon v. Giles*, 8 Wash. Terr. 117.

³ An allowance as compensation to a receiver of a railroad and his solicitor is part of the taxable costs in the case, and as such to be preferred to the receiver's certificates. *Petersburg Sav. & I. Co. v. Dellatorre*, 70 Fed. Rep. 648, 80 U. S. App. 504.

The fees of a receiver of a corpora-

(h) In addition to the receiver's compensation for services he is, as a rule, entitled to be paid from the receivership funds (1) necessary counsel fees for services rendered in his behalf for the benefit of the receivership estate,¹ and legitimate expenses and costs² and (2) such additional allowance for extra services

tion should be paid before claims of laborers in the employ of the corporation, under Iowa Acts (23d Gen. Assem. chap. 48), making the claims of such laborers preferred debts to be paid after first paying "all costs" occasioned by the seizure of property. *St. Paul Title Ins. & T. Co. v. Diagonal Coal Co.* (Iowa) 64 N. W. 606.

¹ While a receiver may employ counsel, if necessary, and bind the estate to their payment, he cannot charge for professional legal services rendered by himself. *State v. Butler*, 15 Lea, 118.

A receiver cannot charge counsel fees for services performed by himself. *Re Bank of Niagara*, 6 Paige, 218.

And he will not be allowed *per diem* compensation for particular services, or any other allowance, beyond his commission, except attorney's and solicitor's fees, if he acts as such. *Re Bank of Niagara, supra*.

A receiver, upon the passing of his accounts, is not entitled to an allowance out of a fund in his hands as receiver for counsel fees which he has paid on an unsuccessful defense to a suit brought against him by the owner of such fund, nor for the expenses of an unsuccessful appeal brought by him from the decree in such suit. *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 578.

It is improper for the solicitor of the complainant, at whose suit a receiver was appointed, to act as counsel for the receiver; and no compensation for such services can be paid

from the fund in the receiver's hands. *Heffron v. Flower*, 35 Ill. App. 200; *Baker v. Backus*, 32 Ill. 79, 115; *Merchants' & M. Nat. Bank v. Kent Circuit Judge*, 43 Mich. 292; *Benneson v. Bill*, 62 Ill. 409.

Policy holders in an insolvent life insurance company employed an attorney to resist the allowance of improper charges made by the receiver,—Held that the attorney's compensation was not payable from the assets. *Atty. Gen. v. Continental L. Ins. Co.* 81 Hun, 623; *Atty. Gen. v. North American L. Ins. Co.* 91 N. Y. 57. See also Laws of 1883, § 5, chap. 378.

Where one of the defendants in a certain cause was charged by a decree of the court with the collection of certain policies of insurance, for the benefit of lienholders upon the insured property,—Held that he was authorized to place the matter at once in the hands of competent attorneys, and was properly allowed a reasonable amount paid for their services, although the insurance was paid without litigation. *Abbott v. Downer*, 54 Iowa, 687.

² A receiver properly appointed is entitled to his costs for attending court—\$40 for two days' attendance. *Louisville & St. L. R. Co. v. Southworth*, 38 Ill. App. 225.

The receivers of an insolvent corporation were allowed their costs of resisting in good faith a claim of set-off, by a debtor of the corporation, though the set-off was finally allowed by the court. *Holbrook v. American F. Ins. Co.* 6 Paige, 220.

No part of the expenses of a receiver

rendered not anticipated, but which are for the benefit of the estate.¹

(i) Where the statute has fixed the compensation for the receiver there is no discretion as to the amount.²

appointed for the benefit of an insolvent railroad company and its creditors is chargeable against the property of another railroad company leased by the insolvent company. *Brown v. Toledo, P. & W. R. Co.* 35 Fed. Rep. 444.

A savings bank receiver was allowed \$6,000 a year for his services,—Held that he could not charge the fund with the expense of unnecessary clerks, a daily newspaper, nor counsel fees paid in resisting applications that he should not have opposed; that his individual indebtedness to the bank should be offset against the amount due him, as well as money lost through his failure seasonably to remit revenue stamps for redemption, and money lost by having been improvidently lent by him on inadequate security; but that he should be allowed for money lost through misappropriation by the attorney who had been employed by him to make collections, the attorney being in good standing when employed. *Re Union Bank*, 37 N. J. Eq. 420.

¹A receiver appointed to take charge of a large hotel property, pending a suit for rescission of a contract for its sale,—Held, entitled to credit in his account for money paid by him for insurance on the same, although without special order from the court, if the court can see that the receiver acted in good faith and under such circumstances as would have authorized an order had such authority been asked. *Brown v. Hazlehurst*, 54 Md. 26.

A receiver who performs duties additional to those ordinarily required may be entitled to extra allowance.

Thompson v. Willamette S. M. L. & Mfg. Co. 15 Or. 604.

Unless he voluntarily performs such duties, or was not required to perform the same. *Thompson v. Willamette S. M. L. & Mfg. Co. supra.*

A receiver will not be allowed additional compensation for himself and counsel where the compensation already made is sufficient, taking into consideration the services rendered and the circumstances of the case, but refusal will be made subject to the right to apply for services rendered and expenses incurred after the date of the decree. *Montgomery v. Petersburg Sav. & I. Co.* 70 Fed. Rep. 746, 30 U. S. App. 511.

A receiver of an estate appointed by an order fixing his compensation at \$100 per month is not entitled to additional compensation, where the gross amount of assets realized by him is only \$10,000, and he is allowed a liberal amount for counsel fees. *Henry v. Henry*, 103 Ala. 582.

²*Re Woven Tape Skirt Co.* 85 N. Y. 506.

Chapter 878, § 2, Laws of 1883, has no application to receivers appointed and who have entered upon the discharge of their duties before the passage of the act. The law is prospective only. *People, Newcomb, v. McCall*, 94 N. Y. 587.

N. Y. Laws 1883, chap. 878, in reference to receivers' fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, not to a receiver in foreclosure proceedings, the fees of whom are regulated by N. Y. Code, § 8320. *United States Trust*

(j) The order fixing compensation cannot be revoked, after the term of court has expired, for mere error.¹

Co. v. New York, W. S. & B. R. Co. 101 N. Y. 478. Cf. *Atty. Gen. v. Guardian L. Ins. Co.* 98 N. Y. 631; *Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 94, 29 Hun, 207.

The act of 1831, South Carolina, regulating the fees of receivers, applies to all receivers, whether officers of court or otherwise. *Massey v. Massey*, 1 Cheves, Eq. 159.

By the fair construction of 2 N. Y. Rev. Stat. 93, § 58, allowing commissions to executors, etc., for "receiving and paying out" moneys, a receiver is entitled to one half of the specified rates for receiving, and one half for paying out.

He is also entitled to be repaid actual disbursements, prudently made or incurred, in the case of the trust property. *Hovess v. Davis*, 4 Abb. Pr. 71.

As to compensation in New York, see Laws of 1883, chap. 878, § 2, Code Civ. Proc. § 3320.

¹A motion to set aside for mere error a final decree fixing and allowing the compensation of a receiver of an insolvent corporation, and counsel fees and other charges and expenses of administration, cannot be made

after the term of court at which the decree was rendered, although no notice was given to certain parties interested, as every party to such proceeding is chargeable with notice of such action of the court. *Clements v. Empire Lumber Co.* 96 Ga. 319.

A receiver of a corporation is entitled to compensation out of the funds which come into his hands as receiver, although his appointment is revoked on appeal, both in the absence of a statute on the subject and under Sayles' Tex. Civ. Stat. Supp. art. 1466, providing that all moneys that come into the hands of a receiver as such shall be first applied to the "payment of all court costs of the suit." *Espuella Land & O. Co. v. Bindle* (Tex. Civ. App.) 32 S. W. 582.

A master in chancery, acting as receiver, acts in a distinct character, and is entitled to compensation as receiver. *Arthur v. Master in Equity*, 1 Harp. Eq. 47.

Compensation of receivers of an insolvent railroad corporation,—determined, with reference to the circumstances of the particular case. *McArthur v. Montclair R. Co.* 37 N. J. Eq. 77.

CHAPTER XXI.

REPORTS, ACCOUNTS AND DISTRIBUTION.

§ 355. General—Reports and accounts.

§ 356. Rules applicable to.

- (a) Must be to court appointing.
- (b) Reference to master.
- (c) Objections to master's findings.
- (d) Objections to master's findings and exceptions.
- (e) Appeal not allowed as a rule.
- (f) Effect of approval.

§ 357. Order of distribution.

§ 358. What embraced in order of distribution.

- (a) Attorney's fees.
- (b) Notes secured by invalid mortgage.
- (c) Debts due contractors.
- (d) Rents and profits.
- (e) Expenses and advancements.
- (f) Money paid by sureties.
- (g) When on judgments.
- (h) Where collaterals are held.

§ 355. General—Reports and accounts.

It is the duty of the receiver to report to the court from time to time the condition of his accounts, so that at all times all parties in interest may have official information as to the true condition of affairs, and this should be done without an order of court requiring him to do so. Being an officer of court, a great degree of strictness is required of him, and the funds in his possession being trust funds, the utmost care must be exercised in reference to their disposition and his accountability therefor. A proper accounting from time to time, as well as his final report, renders it incumbent on the receiver to carefully inventory the estate, property, goods, and effects of every nature that come to his hands. Nothing but the most general rules in regard to the receiver's reports and accounts can be laid down, owing to the infinite variety of receivership property coming into his hands, and the varied duties pertaining thereto under the direction of the court. Besides, the practice is by no means uniform in the different courts.

The disbursements made by a receiver, for which the court will allow him in his accounts, have been fully considered in chapters relating to powers and liabilities of receivers and no good purpose can be served by a recapitulation in this connection.¹

¹ See chapters III. and VIII.; also claims against receivership funds, *ante*.

§ 356. Rules applicable to.

(a) The receiver is responsible only to the court appointing him, and cannot be required to turn over the receivership property or funds upon the order of another court. He must make his reports to, and his accounts are to be adjusted only by, the court of his appointment.¹

(b) The usual and appropriate practice is to refer the receiver's accounts to a master to be passed upon, and when passed by the master are confirmed by the court on the presentation of the master's report, unless objections and exceptions are filed by the parties having a right to be heard in opposition thereto. The court may consider the rules and principles adopted by the master in passing the accounts, and if erroneous may refer the matter back to the master for a restatement of the account in accordance with its directions, but cannot be expected to review the account item by item.²

(c) It is necessary, if exception is taken to the action of the master concerning the account, to point out specifically the items to which error is assigned, and the objections should be sufficiently specific so that the court may readily see the force of the objection.³

¹ *Mabry v. Harrison*, 44 Tex. 286; *Musgrove v. Nash*, 8 Edw. Ch. 172; *Conkling v. Butler*, 4 Biss. 22.

² A receiver as well as the master is an officer of the court, and states his own accounts and submits them to the master for inspection, under the order of the court, the master acting in the place of the court in a judicial rather than in a ministerial capacity. Exceptions to the master's report do not lie in such cases, though if any erroneous principle be adopted in allowing a receiver's account, the court, on petition, will refer the matter back for correction. It is the duty of the court to review the principles and rules adopted by the master in allowing the accounts, rather than to examine the items in detail, or the evidence on which they were founded.

Cowdrey v. Galveston, H. & H. R. Co. 1 Woods, 331.

Cf. *Brower v. Brower*, 2 Edw. Ch. 631. Objection to the master's report must be by a party to the suit. *People v. Columbia Car Spring Co.* 13 Hun, 585; *Schenck v. Ingraham*, 5 Hun, 397. In New York the account may be sent to a referee for passing. *People v. Knickerbocker L. Ins. Co.* 31 Hun, 622.

³ *Heise v. Starr*, 44 Ill. App. 406. The objection must be made at the time of the allowance or within such time as the court may allow for such purpose. *Terry v. Dubois*, 32 Week. Rep. 415. Cf. *Farmers' Loan & T. Co. v. Central R. Co.* 1 McCrary, 332.

Where a receiver files exceptions of fact to the auditor's report on his account, he is entitled to a jury to

(d) Fairness to the master and to the receiver requires that objections be filed before the master in order that he may have an opportunity for correction and that additional evidence may be furnished by the receiver if necessary.¹ The hearing before the court is upon exceptions filed.

(e) As a rule, an appeal by the receiver will not lie from an order approving a receiver's account and directing him to turn over the receivership funds, except for error as to the amount to be turned over.²

(f) If the receiver's accounts have been approved and he has been discharged by the court no further inquiry will be permitted as to his management.³

§ 357. Order of distribution.

The distribution of the receivership funds, *pendente lite* or final, presupposes an order of court authorizing it, and also the amount and pro rata share to each party entitled thereto if the indebtedness is not paid in full. The order of course is based upon accurate information of the net amount to be distributed and the amount of indebtedness upon which the distribution is to be applied. The order of distribution, whether interlocutory or final, is subject to modification and correction by the court,⁴ and unless for good reason to the contrary, should be to all the creditors alike.⁵

pass upon them. *Akers v. Veal*, 66 Ga. 302.

¹ *Cowdrey v. Galveston, H. & H. R. Co.* 1 Woods, 381.

² *Hinckley v. Gilman, C. & S. R. Co.* 94 U. S. 467, 24 L. ed. 166; *Hov v. Jones*, 60 Iowa, 70. Of course the decree to be appealable must be final. *Rochat v. Gee*, 91 Cal. 355; *Illinois Trust & Sav. Bank v. Pacific R. Co.* 99 Cal. 407.

³ *Lehman v. McQuown*, 81 Fed. Rep. 138.

⁴ An interlocutory order directing a receiver to pay out more money than is in his hand will be modified, and the application for its modification may be heard in a summary way on

the merits. *Ryon v. Thomas*, 104 Ind. 59.

Where the settlement has been made and order entered requiring the receiver to pay out more money than he has in his hands the order may be modified and the mistake corrected. *Ryon v. Thomas*, *supra*.

⁵ In the absence of good reason to the contrary, proportionate payment should be made to all creditors entitled to share in a fund in the hands of a receiver. *Girard L. Ins. A. & T. Co. v. Cooper*, 51 Fed. Rep. 332, 4 U. S. App. 681.

A receiver appointed in a suit to foreclose a mortgage made by a corporation, under allegations of the

The order to a receiver to pay over funds in his hands is based upon notice to the receiver and served upon him, or in his absence upon his attorney,¹ and may be granted on affidavits.² The order for distribution is usually made upon final hearing,³ though if substantial distribution can be made it should not be delayed because of a pending controversy over a small amount,⁴ and when made is final and conclusive as to all claims filed and duly passed upon,⁵ but in all cases before an order for distribution is made the funds must be in court.⁶

§ 358. What embraced in order of distribution.

(a) ATTORNEY'S FEES.

In the order of distribution in addition to the ordinary credit-

latter's insolvency, discontinuance of business, and necessity of the appointment to secure the application of the rents and profits, should not, upon the mortgage being held an illegal preference, be directed to pay in full the judgments of the intervening creditors who attacked the mortgage, but the fund should be distributed among all the corporate creditors. *Thompson v. Huron Lumber Co.* 4 Wash. 600.

A receiver of a bank which had collected notes and drafts of another bank may be compelled to pay the same in full with interest and not *pro rata*. *Thompson v. Gloucester City Sav. Inst.* (N. J.) 8 Atl. 97.

¹ Notice of an order to a receiver to pay over funds served in his absence on his attorney,—Held, sufficient. *Jennings v. Simpson*, 12 Neb. 558.

² *Ex parte* affidavits, whether previously filed in the case or not, may be considered on a motion to dispose of property remaining in the hands of a receiver after the dismissal of the bill. *Warren v. Bunch*, 80 Ga. 124.

³ A receiver appointed *pendente lite* cannot be directed to pay claims out of the moneys coming into his hands, before the final hearing, except by

consent of all parties. *Forsyth Mach. Co. v. Hope Mills Lumber Co.* 109 N.C. 576.

⁴ Where substantial distribution of a fund in a receiver's hands for the settlement of a partnership can be made, such distribution should not be delayed because of a pending controversy concerning an outstanding claim for a small amount. *Trayhern v. Mechanics' Nat. Bank*, 57 Md. 590.

⁵ The functions of a receiver in proceedings to enforce statutory liens, to preserve the property and security *pendente lite*, end with a sale of the property under order of the court, and payment of the full claims of the creditors, reported to the date of sale and duly passed upon; and it is error at the next term of court, to which by stipulation his reports were continued for consideration, to decree that moneys expended by him after the sale shall be a lien on the property, antedating the decree under which it was sold. *Bassick Min. Co. v. Schoolfield*, 15 Colo. 876.

⁶ Receivers will not be instructed as to the distribution of funds until they have them in court. *Strauss v. Carolina Interstate Bldg. & L. Asso.* 117 N. C. 808, 80 L. R. A. 698.

ors, the receiver may be directed to pay attorney's fees when he is employed by direction of the court, or the necessity of his employment established prior to the granting of the order.¹ Where the court passes upon the question of the amount to be paid as attorney's fees, and the attorney is heard upon the matter, the order is conclusive and binding upon him and is a bar to a subsequent action by him therefor.² But it seems that before fees can be allowed to counsel there must be a contract for his services, express or implied; a mere volunteer in receivership matters is not sufficient.³ It has also been held that services rendered for a corporation before the appointment of a receiver are not entitled to priority over the mortgage bondholders, though their services were valuable to that company and established the validity of its bonds.⁴ But where the attorney is employed at a

¹ A receiver employing counsel to advise him, without express authority from the court, will not be allowed counsel fees on settlement unless he establishes the necessity therefor. *Terry v. Martin* (N. M.) 32 Pac. 157.

The court should not direct a receiver to pay his attorney more than the attorney himself asks for in his petition, even though there be evidence justifying a larger charge. *Richter v. Schroeder*, 110 Ill. 112.

² The decision of a court on settlement of a receiver's accounts as to compensation to be paid to an attorney employed by him without special agreement as to the amount to be paid him, where the attorney was notified and appeared, and was heard in respect to the claim, is conclusive against the attorney and a bar to a subsequent action by him against the receiver personally. *Walsh v. Raymond*, 58 Conn. 251.

An order directing the payment by a receiver, out of a fund in his hands, of the solicitor's fees of a party to litigation concerning it, before the right of that party to any portion of the fund has been established, is errone-

ous. *Doane v. Corbin*, 44 Ill. App. 463; *Coates v. Cunningham*, 80 Ill. 467.

³ An allowance out of funds in the hands of a receiver will not be made to one rendering services availed of by counsel for the receivers and useful to the latter in litigation, when such services were not rendered in pursuance of any contract, express or implied, and the receivers made a contract with him when his services were needed by them in other matters. *Re Whittemore*, 157 Mass. 46. It was also held in this case that counsel was not entitled to compensation by reason of laches.

⁴ Attorneys who act for a railroad corporation two years before the appointment of a receiver in mortgage foreclosure, and by whose services town bonds voted in aid of the company were declared valid and given a value, are not entitled to have the lien of the mortgage displaced in their favor so as to give them priority in the funds in the hands of the receiver, although such services secured the means for constructing the road and added to the value of the property covered by the mortgage. *Pennsyl-*

fixed salary, he is entitled to a preference as an employee, but not if the services were before the construction of the road.¹ Funds wrongfully paid to receiver's attorneys will be required to be paid back by the latter.²

(b) NOTES SECURED BY INVALID MORTGAGE.

Notes secured by a mortgage, where the mortgage is subsequently declared invalid, will not be ordered to be given up and sold by the receiver where the purpose is to place them, subject to process of a state court, in favor of certain creditors.³

Pennsylvania Finance Co. v. Charleston, C. & O. R. Co. 53 Fed. Rep. 678.

¹ An attorney employed by a railroad company at a fixed salary is an employee entitled to share in the income realized by a receiver appointed in a mortgage foreclosure under an order providing for the payment of all employees; but where the services rendered by him were before the construction of the road he is not entitled to share in the proceeds of sale although the income fails. *Pennsylvania Finance Co. v. Charleston, C. & O. R. Co.* 53 Fed. Rep. 526.

A receiver will not be compelled to pay counsel of a creditor of the corporation whose property is in his hands, for services in procuring an order for payment by the receiver of the sum due under a contract with the corporation, although such creditor is preferred in having a right to possession of property in the hands of the receiver unless such sum is paid, and the claim of such creditor is undisputed, since there is no duty on the part of the receivers to proceed affirmatively and procure the allowance of claims against them. *Central Trust Co. v. Valley R. Co.* 55 Fed. Rep. 903. The cases of *Philadelphia Invest. Co. v. Ohio & N. W. R. Co.* 46 Fed. Rep. 696, and *Easton v. Houston & T. O. R. Co.* 40 Fed. Rep. 189, distinguished.

² A court receiver who, while a fund erroneously ordered to be paid over to him for distribution is in his possession, pays out a portion of it in good faith under the court's direction, will be protected to that extent; but attorneys to whom any portion of the money has been paid as fees will be required to pay it back to him, and upon receipt thereof he will be directed to pay it to the party entitled thereto. *Re Home Provident Safety Fund Assn.* 129 N. Y. 288.

³ Notes and a mortgage owned by a railroad company of which a receiver has been appointed with the consent of all parties in interest after the mortgage, is held invalid, and of whose property inventoried by the receiver, including such notes and mortgage, a sale has been decreed upon the same consent, will not, although illegally taken possession of by the receiver, be ordered to be given up and not sold by him, on the application of the creditors who joined in such consent, in order to enable the latter to subject them to process upon judgments obtained in a state court. *Farmers' Loan & T. Co. v. San Diego Street Car Co.* 49 Fed. Rep. 188; *Gumbel v. Pitkin*, 124 U. S. 181, 31 L. ed. 374. Cf. *Lowe v. Stephens*, 66 Ga. 607, as to effect of filing a general creditor's bill upon a pending attachment.

(c) DEBTS DUE CONTRACTORS.

Contractors upon a contract partially completed at the time of granting a receivership are entitled to be paid the contract price up to the time they are directed by the receiver to cease working.¹

(d) RENTS AND PROFITS.

Rents collected by a receiver upon mortgaged property pending a suit in which the first mortgagee is a party and who subsequently brings a suit to foreclose, are properly payable to the first mortgagee if there is a deficiency as to the first mortgage.² Where rent notes are given to a receiver for premises, pending an action in relation to the title, and the maker is subsequently decreed to be the owner, they should be canceled.³

(e) EXPENSES AND ADVANCEMENTS.

Where plaintiff pending suit advances money to pay taxes in an action to remove a cloud from the title, he is entitled to be

¹ Contractors to erect a building for a railroad company which goes into the hands of receivers are entitled to the contract price up to the time they are directed by the receivers to cease work. *Girard L. Ins. A. & T. Co. v. Cooper*, 51 Fed. Rep. 382, 4 U. S. App. 631.

² *Cincinnati Nat. Bank v. Tilden*, 50 N. Y. S. R. 866.

A receiver was in possession of a wharf and of the adjacent land, having taken possession thereof from the defendant, and received money from the use of the entire premises, the adjacent land only was adjudged to belong to plaintiff.—Held that, upon discharge of the receiver, it was error to direct that the whole of the money be paid to plaintiff. *Coburn v. Ames*, 57 Cal. 201.

³ Where a receiver was appointed in an action to determine rights to land, on the ground that the contract therefor had been rescinded, rent

notes given by the plaintiff to the receiver for rents pending the action should be canceled and possession restored to him if he is adjudged to be the owner. The defendant can have no claim to the rents in such a case. *Morgan v. Oliver*, 11 Ky. L. Rep. 513.

A court of chancery will not order a receiver of the rents and profits of real estate to pay over or account for them to a party whose claim is not a charge upon the land. *Baltimore v. Chase*, 2 Gill & J. 376.

In *Pacific R. Co. v. Wade*, 91 Cal. 449, 13 L. R. A. 754, it was held that the amount to be paid for the joint use of a street railway track in the hands of a receiver may be determined by the court on a petition, where the statutes give the right to such use on payment of one half the cost of construction; and there is no right to a jury on the ground that it involves the exercise of the right of eminent domain.

reimbursed upon a dismissal of his bill.¹ As elsewhere seen a receiver by direction of the court may incur such expenses as are required for the preservation of the receivership property.²

(f) MONEY PAID BY SURETIES.

Sureties having paid money for the use of a corporation, growing out of appeal bonds given in condemnation proceedings are entitled to be paid from the proceeds of sale in a foreclosure proceeding.³

¹ Where plaintiff, on a bill to remove a cloud from a title, paid the taxes pending the suit, where the receiver should have paid the taxes from rents collected, upon his bill being dismissed is entitled to reimbursement from the funds in the receiver's hands. *Wicks v. Sears*, 4 Lea, 298.

A court of chancery may incur such expenses as are necessary for the preservation of a railroad in its custody, after the company owning the road has forfeited its charter, when its income is sufficient by creating liens through the issue of receivers' certificates, which displace pre existing liens. *State v. East Line & R. R. Co.* (Tex.) 48 Am. & Eng. R. Cas. 656; *Union T. Co. v. Illinois Midland R. Co.* 117 U. S. 455, 29 L. ed. 970.

A receiver of a street railway company appointed in a suit to foreclose a mortgage will not be directed to pay out moneys in his hands for paving the street between and along the tracks, where no lien exists therefor, although there be a specific contract by the company to make such payment. *Union Loan & T. Co. v. Southern California Motor Road Co.* 49 Fed. Rep. 267.

On petition that the receivers of mortgaged railroad property be ordered to pay the expense of certain negotiations for a purchase, it appearing that there was no surplus money in the receiver's hands, and that it

was not absolutely certain that the negotiations would be successful,—Held that the petition should be refused. *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 25 Fed. Rep. 69.

² At the final settlement of the accounts of the receivers of an insolvent corporation, the court refused to inquire into and reduce the master's taxed bill of fees for services in the case, which had been paid by the receivers, and for which they had a receipt. *Re Bank of Niagara*, 6 Paige, 213.

A receiver of a railroad company will not be authorized to pay expenses incurred by a committee appointed to reorganize a road, under an order authorizing the pledge of securities by the company for money to be borrowed to relieve it from its financial embarrassment at a time when no creditors had sought to foreclose any liens, leaving such expenses to be subsequently passed upon by the court, where, since such order, a bill to foreclose a mortgage has been filed, and the receivership extended thereto and modified so as to enable the mortgagee to reach equitable assets through the receivership, and other creditors have intervened and filed collateral proceedings upon liens, and such parties are not before the court upon the application. *Clarke v. Central R. & Bky. Co.* 54 Fed. Rep. 556.

³ Sureties on appeal bonds given on

(g) WHEN ON JUDGMENTS.

A receiver will not be required to pay a judgment claimed to be a prior lien until there has been a full hearing of all parties as to priority.¹

(h) WHERE COLLATERALS ARE HELD.

Where collaterals are held by a national bank dividends are to be paid to the holder of such collaterals, after deducting the amounts collected on the collaterals, after the maturity of the loan and before the proof of the claim, but without deducting collections made after proof of claim.²

appeal from judgments rendered in condemnation proceedings, who were forced to pay for the right of way over the appellee's lands because the railroad was in a receiver's hands when the bonds were enforced against them, are entitled to be repaid out of the proceeds of a mortgage foreclosure sale of the road. *Rome & D. R. Co. v. Sibert*, 97 Ala. 898.

¹ Where funds are in the hands of a receiver, a creditor in a judgment at common law cannot obtain a rule against the receiver for the payment of the judgment in full, without a full hearing of all parties as to the priority of all claims. *Love v. Stephens*, 66 Ga. 607.

A receiver will not be required to

pay the full amount of the claim of an attaching creditor until the latter shows that he has by his attachment acquired a lien upon sufficient goods to pay the whole amount of his claim. *Glines v. Supreme Sitting, O. of I. H.* 50 N. Y. S. R. 743.

A receiver of a partnership will not be directed to pay out of the assets a judgment recovered upon a partnership indebtedness after he took possession, where the estate is insolvent or there is nothing in the nature of the claim of the creditor which should entitle him to priority over other creditors. *Hoerle v. McIlhargy*, 29 Jones & S. 184.

² *Chemical Nat. Bank v. Armstrong*, 50 Fed. Rep. 798.

CHAPTER XXII.

PRACTICE AND PLEADING.

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| § 385. Reference to master or referee. | § 411. Leave to issue certificates. |
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§ 370. General.

Owing to the dissimilar systems of practice existing under the prevailing methods of administering equity jurisprudence in the several states of the United States, the limits of this work preclude any attempt to enter into the details of such practice even as to the single subject of receiverships. The modification of the equity practice by statute in most of the states, as well as in England, has rendered much of the earlier practice in both

countries inapplicable to the present order of things, and has been prolific in producing the lack of harmony in the procedure as administered in the various jurisdictions of this country. Experience teaches that it is beyond the power of man to construct a code of procedure, even upon a single branch of the subject sufficiently broad and comprehensive to embrace all the phases of the subject as they present themselves in courts of justice. This limitation results in repeated amendments as exigencies arise, changing the mode of procedure to the supposed requirements. These modifications result in revisions from time to time, and thus we have a practice constantly changing, which is rendered still more unstable and uncertain by the judicial construction and judicial attempts to arrive at the legislative meaning as embodied in the various statutes, amendments, and modifications. The decisions, even of the same court, are often wholly irreconcilable with each other, owing to the fact that they are under statutes dissimilar in their nature and application. There are to be found many cases upon a given topic that apparently are general in their nature and yet upon a careful examination are local, being based upon a statute. This is said not by way of criticism but as a prelude to the subject under consideration, much of which is subject to statutory influence.

There are, however, a few principles which lie at the foundation of the practice in so far as receivership matters are concerned, that are so general in their nature that they may properly be considered in this connection, and it is hoped may be of some service to the practitioner, subject, nevertheless, to the caution embraced in the preceding section. They follow.

§ 371. Suit pending.

Except in one or two unimportant cases it is preliminary and a prerequisite to the appointment of a receiver in any of the several proceedings in which such action is asked that there shall be, at the time, a suit or proceeding pending in which the court is asked to make the appointment.¹

¹ *Baker v. Backus*, 32 Ill. 79; *Jones v. Schall*, 45 Mich. 379; *Merchants' & M. Nat. Bank v. Kent Circuit Judge*, 48 Mich. 292; *Gravenstine's Appeal*, 49

Pa. 310; *French v. Gifford*, 30 Iowa, 148; *Harwell v. Potts*, 30 Ala. 70; *Hardy v. McClellan*, 53 Miss. 507; *Pressley v. Harrison*, 102 Ind. 14;

§ 372. Prayer for receiver.

The bill or petition must contain a prayer for the appointment of a receiver, or at least such a state of facts alleged and shown on the hearing as will justify the court in making the appointment on proper application as part of the general relief asked.¹

§ 373. Necessary parties; allegations.

The person or corporation in custody of the property over which the receivership is asked to be extended, or to whom the property belongs, is a necessary party to the suit or proceeding. The allegations are to be set forth in the bill or complaint in clear and unequivocal language, and the necessary allegations vary with each particular kind of proceeding under which the remedy is sought.²

§ 374. Notice of application.

Except in cases of the gravest emergency, notice must be given to the person or corporation from whom the possession or custody is to be taken by the proposed receivership,³ and if there is such an emergency, or other excuse, for not giving notice, the

Jones v. Bank of Leadville, 10 Colo. 464; *Guy v. Doak*, 47 Kan. 236; *Gold Hunter Min. & S. Co. v. Holleman*, 2 Idaho, 839; *Davis v. Flagstaff Silver Min. Co.* 2 Utah, 91.

See also § 18, *ante*.

¹ *Ladd v. Harvey*, 21 N. H. 514; *Augusta Ice Mfg. Co. v. Gray*, 60 Ga. 344; *Connelly v. Dickson*, 76 Ind. 440; *Olyburn v. Reynolds*, 31 S. C. 91; *Shannon v. Hanks*, 88 Va. 338.

² *Dale v. Kent*, 58 Ind. 584; *Baker v. Backus*, 82 Ill. 79.

³ *Voshell v. Hynson*, 28 Md. 88; *Nusbaum v. Stein*, 12 Md. 315; *Blondheim v. Moore*, 11 Md. 365; *Howe v. Jones*, 57 Iowa, 180; *Bison v. Curry*, 35 Iowa, 72; *French v. Gifford*, 30 Iowa, 148; *Moritz v. Miller*, 87 Ala. 331; *Thompson v. Tower Mfg. Co.* 87 Ala. 733; *Crowder v. Moore*, 52 Ala. 220; *Meridian News & Pub. Co. v. Diem*,

70 Miss. 695; *Buckley v. Baldwin*, 69 Miss. 804; *Whitehead v. Wooten*, 48 Miss. 523; *Ruffner v. Mairs*, 33 W. Va. 655; *Fricker v. Peters*, 21 Fla. 254; *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201; *People v. Albany & S. R. Co.* 55 Barb. 369; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438; *People v. Albany & S. R. Co.* 7 Abb. Pr. N. S. 265, Affirmed in 57 N. Y. 161; *Field v. Ripley*, 20 How. Pr. 26; *Simmons v. Wood*, 45 How. Pr. 268; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255; *Cook v. Detroit & M. R. Co.* 45 Mich. 453; *Cleveland, O. C. & I. R. Co. v. Jewett*, 37 Ohio St. 649; *Fredenheim v. Rohr*, 87 Va. 764; *Rogers v. Dougherty*, 20 Ga. 271; *Lammon v. Giles*, 3 Wash. Terr. 117; *Grandin v. La Bar*, 2 N. D. 206; *Haas v. Chicago Bldg. Soc.* 89 Ill. 498. See also § 5 ¶ d, *ante*; and § 18, note 1, *ante*.

facts which constitute such emergency or excuse must be alleged and shown. Conclusions are not sufficient.¹

§ 375. At what stage of suit application made.

As a general rule the receiver is applied for and the appointment made in an interlocutory proceeding in the case, though sometimes he is appointed on the hearing or even subsequent to the granting of the decree if the circumstances warrant it.²

§ 376. When application granted before answer.

The appointment of a receiver may be made before the defendant has filed his formal answer in the case, but it is usually done where the urgency is clear, or where the defendant by counter-affidavits has set up his defense, upon the questions embraced in the application. It must be a strong case, and there must be a clear case of fraud or danger.³

§ 377. Bond of receiver required.

Except where otherwise directed, before the receiver will be permitted to enter upon the performance of his official duties he will be required, usually by order of court, to give bond conditional for the faithful performance of his duties as receiver, with security, to be approved by the court, or the clerk if so directed.⁴

§ 378. Effect of giving bond.

The giving of a bond being usually required by the order, and

¹ In order to procure the appointment without notice the facts which are relied on as constituting an excuse must be stated. General allegations are insufficient. *Darcin v. Wells*, 61 How. Pr. 259; *Blondheim v. Moore*, 11 Md. 365; *Wabash R. Co. v. Dykeman*, 133 Ind. 56; *Chicago & S. E. R. Co. v. Cason*, 133 Ind. 49; *Lindsay v. American Morig. Co.* 97 Ala. 411; *Morits v. Miller*, 87 Ala. 331; *State, Brittin, v. New Orleans*, 43 La. Ann. 829; *Meridian News & Pub. Co. v. Diem*, 70 Miss. 695; *Virginia, T. & C. Steel & I. Co. v. Wilder*, 88 Va. 942; *Young v.*

Rollins, 85 N. C. 485; *Ruffner v. Mairs*, 38 W. Va. 655; *Maynard v. Railey*, 2 Nev. 313; *Fricker v. Peters*, 21 Fla. 254.

² See § 12, ¶ b, note 1, *ante*; also § 23, note 2, *ante*.

The appointment may be even after decree in a case of urgency. *Haas v. Chicago Bldg. Soc.* 89 Ill. 498; *Adkins v. Edwards*, 83 Va. 316. See also § 12, ¶ c, note 2, *ante*.

³ *Johns v. Johns*, 23 Ga. 31. See also § 12, *ante*.

⁴ See § 23, *ante*.

the appointment being conditional thereon, it follows that upon compliance with the order in this respect the receiver becomes an officer of court, and immediately entitled to the possession of the receivership property, and the rights and interests of all parties therein relate back to the date of granting the order.¹

§ 379. Form of bond.

The almost uniform practice in appointing a receiver is to require him to give a bond or undertaking with sufficient security, the usual conditions of which, in general terms, are to do and perform all such orders and directions as the court shall from time to time make, and faithfully discharge and perform all and singular the duties pertaining to his office as receiver. The bond may be renewed, increased, or new bond required as the court may order.²

¹ See § 28, note 1, p. 74, *ante*.

² In *State v. Gibson*, 21 Ark. 140, the condition of the receiver's bond was if the said Edward A. Gibson, as receiver, shall well and faithfully perform the trust and office of receiver of the stock and business of the partnership effects of the said firm of F. A. Peterson & Co. and shall account to the said Union Circuit Court according to law, then the above obligation to be void, else to remain in full force. Suit being brought upon the bond it was held that a compromise and dismissal of the bill did not discharge the receiver from accountability to the court, but the receiver was not liable to an action on his bond as receiver until he had failed to obey some order of court in relation to the property.

In *Banks v. Potter*, 21 How. Pr. 469, it is held that where a receiver has given ample security on his first appointment there is no necessity in requiring him to give security over again in every proceeding that may be thereafter instituted. He is an officer of court and the administration must

necessarily take place under the control and direction of the court appointing the receiver.

In *Stewart v. Johnston*, 87 Ga. 97, an order of court requiring the receiver to give a new bond in the same amount and conditioned as his existing bond, will not operate after the new bond has been given to discharge the surety from the old bond from liability for future defaults of the receiver, there being nothing in the case to indicate that the new bond was in lieu of the old bond, or was intended as a substitute therefor. See also *Bank of Washington v. Creditors*, 86 N. C. 323.

In *Wabash R. Co. v. Stewart*, 41 Ill. App. 640, where a right of action existed against the receiver, it was held that the liability continued against the purchaser who took possession of the property under the decree which provided that the purchaser should pay, satisfy, and fully discharge all debts and liabilities of the receivership of every kind.

§ 380. How liability enforced.

The usual form of proceeding in order to enforce the liability on the bond is to determine in a proceeding in the original action the liability of the receiver upon his bond, and this having been ascertained it is usually followed by an order requiring him to perform the order within a specified time, and in case of default leave to sue upon the bond be given. Suit on the bond is maintained by the real party in interest.¹

§ 381. The order appointing.

The order appointing a receiver varies with the character of

¹In *Thomson v. MacGregor*, 81 N. Y. 592, it was held that in the absence of express terms in the bond binding the surety to submit to the judgment of the court, a liability cannot be fixed upon the surety for a failure of the receiver to comply with the order of the court directing him to pay over money.

In *Atkinson v. Smith*, 89 N. C. 72, it was charged that the receiver had committed a breach of trust, and the court held that the party complaining must first obtain a rule requiring him to render an account, and, if default should be found, apply to the court for leave to sue on his bond. The court say it may be that in some cases the surety might, by order of court, and upon reasonable notice, be brought into the action in which the receiver had been appointed and proceeded against therein, but this is not the usual course pursued, if indeed it could be sustained in any case.

In *Bank of Washington v. Creditors*, 86 N. C. 823, it is held that before a receiver and his surety could be sued on the bond, a default thereof must be ascertained, on a rule from the court appointing, against him to render an account.

In *Baker v. Bartol*, 7 Cal. 551, the defendant was appointed a receiver on condition that he would file a bond

to account, which was done, and subsequently a judgment was recovered against him and demand made thereon, and suit was brought by the plaintiff on the bond, which was made payable to the people of the state of California. It was held that the defendant, having received the benefit of the bond, was estopped from denying its legality, and the plaintiff had a right to sue, though the bond was payable to the people of the state, he being the party in interest.

In *Ludgater v. Channell*, 8 Macn. & G. 175, a balance was found to be due from the receiver by the master, after which the receiver died without payment, and a suit was ordered by the court upon the receiver's recognizance against his personal representatives and sureties.

In *French v. Bauchy*, 57 Hun, 100, the receiver died during his receivership, and an administratrix was appointed and no proceedings were taken to compel an accounting by the receiver or his administratrix, and it was held that an action could not be maintained against the sureties, until an accounting in the court of his appointment was had.

Cf. *State v. Gibson*, 21 Ark. 140; *Bank of Washington v. Creditors*, 86 N. C. 823; *Atkinson v. Smith*, 89 N. C. 72.

the duties imposed upon him in each particular case. Thus he may be receiver of the mortgaged property in one case, or the defendant's property generally in another; he may be the mere custodian and responsible for the safekeeping merely in one case, or charged with not only the custody, but the use and operation, in another; he may be responsible for the collection of the income simply in one case, or have an entire and complicated railroad system, with its accompanying responsibilities and duties, in another.¹

§ 382. Scope of order.

The order should be specific and definite as to the general powers and duties of the receiver. This is required for the due protection of the receiver, as well as those with whom he has dealings and is brought in contact with in business relations. The property over which he is receiver should also be described with sufficient definiteness to be readily recognized. The order may be supplemented, modified, or extended, as the exigencies of the case and the successful termination of the receivership business may require.²

§ 383. Findings embodied in order.

The findings of the court forming the basis of its action should be embodied in the order, or if not specific, reference to the pleadings, affidavits, or evidence should be embodied in the order, so that the grounds upon which the appointment is made are not left uncertain and indefinite. This is particularly important in cases where an appeal from the order is by practice or statute-permissible.

§ 384. Affidavits, when basis of order.

Affidavits upon which the application is made or resisted should clearly and succinctly state the facts and circumstances relied upon as a basis for the action of the court, and should not

¹ See § 22, *ante*. See also *Re Franklin Bank*, 1 Paige, 85; *Skiddy v. Atlantic, M. & O. R. Co.* 3 Hughes, 334. In this case are to be found the bill, order appointing, petitions, and supplementary orders which may be valuable for reference as to forms.

² *Crow v. Wood*, 18 Beav. 271; *O'Mahoney v. Belmont*, 62 N. Y. 133; *Martin v. Burgwyn*, 88 Ga. 78.

And see § 22, *ante*.

be couched in language too general, or be merely conclusions or deductions; and should not be merely upon information and belief, except perhaps where the application or petition is filed by an officer officially charged with such duty.¹

§ 385. **Reference to a master or referee.**

It was formerly the general practice, and is still advisable in some cases, particularly where fraud forms an element, to refer the matter of appointment to a master or a referee, with instructions to take testimony in relation thereto and report to the court his conclusions and recommendations thereon. In such case the report must be confirmed.²

§ 386. **Examination of debtor under code proceedings.**

In many of the states adopting a code procedure in proceedings supplementary to execution, an examination of the debtor is made in a summary manner before the court in which the judgment is rendered, or a referee and the appointment is made or refused upon the basis of such examination.³ Under the New York Code of Procedure it is held that the appointment of a receiver is inherent in equity, except wherein there is a limitation in the code.⁴ In supplementary proceedings in that state the order is usually made upon proof of the return of an execution *nulla bona* requiring the defendant to appear in court in person and be examined with reference to his property. If, upon examination, property is discovered, a receiver is appointed who, upon giving bond as required, becomes vested with the debtors' assets and equitable interests, without conveyance or assignment.⁵

¹ *Heavilon v. Farmers' Bank*, 81 Ind. 249; *Oakley v. Paterson Bank*, 2 N. J. Eq. 173.

² *Re Eagle Iron Works*, 8 Paige, 385; 1 Smith, Ch. Pr. 497; 1 Grant, Ch. Pr. 264; 2 Brown, Ch. Pr. 838; 2 Daniell, Ch. Pl. & Pr. (Perkins' ed.) chap. xxxviii. § 8.

³ *Flint v. Webb*, 25 Minn. 263.

⁴ *Hollenbeck v. Donnell*, 94 N. Y. 842; *United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 483. See N. Y. Code Civ. Proc. §§ 1788, 1801, 1817, 1869, 2464; *Palmer v.*

Clark, 4 Abb. N. C. 25. Application must be made to the court, except in supplementary proceedings, in which case the judge has power by statute. N. Y. Code Civ. Proc. § 2464. In this class of proceedings the court has no power to delegate the appointment to a referee. For general forms relating to the appointment of a receiver under New York practice, see 2 Abbott's New Practice and Forms, p. 143 *et seq.*

⁵ *Cooney v. Cooney*, 65 Barb. 524; *Bostwick v. Menck*, 40 N. Y. 388; *Porter v. Williams*, 9 N. Y. 143.

§ 387. Statutory proceedings.

In England and in most of the states in this country statutes have been enacted providing for the appointment of receivers over corporations upon specified grounds and upon various designated modes of procedure, sometimes upon applications of stockholders, creditors, the attorney general, state auditor, governor, and other specified officers and persons. Under these statutes courts proceed with great caution and the application must be brought strictly within the statutory requirements; and will not be extended by implication. The reason for this rule is based upon the jurisdictional fact that courts of equity, as such, have no power, independent of statute, to wind up a corporation and suspend its corporate functions, and are slow to appoint a receiver as manager in lieu of the corporate authorities and thus, virtually and in effect, accomplish by indirection that which they have no power to accomplish directly.¹

§ 388. National banks.

Under the statutes of the United States relating to national banks the comptroller of the currency is vested with power to appoint receivers over such banks for certain specified causes therein enumerated. U. S. Rev. Stat. §§ 5141, 5151, 5191, 5195, 5201, 5205, 5208, 5238, 5239. The power thus lodged with the comptroller is not exclusive, however, and courts of equity upon other grounds may appoint a receiver, in the absence of action by the former.²

§ 389. Mortgage foreclosures.

The power of a court of equity in foreclosure proceedings to appoint a receiver is part of the incidental jurisdiction of such courts. The basis for the exercise of this power is to be found in the bill or petition, by which it is to be alleged and shown some reason why the court should impound the rents and profits of the mortgaged premises and apply them in reduction of the indebtedness secured, the interests, advancements, and costs and expenses. Sometimes the mortgage or trust deed expressly pledges the rents and profits as part of the security; at other

¹*Bangs v. McIntosh*, 23 Barb. 591.

²6 Biss. 301; *Elwood v. First Nat. Bank*, 41 Kan. 475.

³*Irons v. Manufacturers' Nat. Bank*,

times the rents and profits are taken as incidental to the mortgage, in which the equitable right to a receiver depends upon three things, (a) the right of foreclosure by reason of default,¹ (b) inadequacy of security to pay the mortgage debt, interest, and costs,² (c) the insolvency of the mortgagor or other person liable to pay such debt, interest, and costs.³ Inadequacy of security depends upon general depreciation in the market and rental value of the property, waste of the mortgagor, or other party in possession, destruction or partial destruction of the buildings by fire or otherwise, omission to pay the taxes, diversion of the rent, and income from the payment of interest, and other causes by means of which the debt is increased or the value of the security decreased. The insolvency of the mortgagor, or mortgagor and his grantee, who has assumed the payment of the mortgage debt, is established by showing the return of an execution against them *nulla bona*, that they do not own property, liable to execution, sufficient to pay the mortgage debt. The insufficiency or insolvency may be proved by a variety of facts and circumstances, none of which of itself might be considered sufficient, but taken together establish the allegations in this regard.⁴

§ 390. Suits by receiver.

The power of the receiver to sue under the direction of the court is a necessary incident to the due performance of his duties. Occupying the place of the person or corporation over whose property he is appointed, and succeeding to the rights of such person or corporation, it follows that his right to recover is limited to the right such person or corporation would have had if no receiver had been appointed, except in such cases where the receiver is the representative of the creditors, in which case he may avoid the illegal and fraudulent acts of the party he succeeds.⁵

¹ See § 173, ¶¶ e, f, *ante*.

² See § 174, *ante*.

³ See § 174, ¶ a 2, *ante*.

⁴ See general grounds for appointment in foreclosure proceedings, §§ 171, 172, *ante*, and when not appointed, § 173, *ante*.

⁵ *Curtis v. Leavitt*, 15 N. Y. 9; *Leav-*

itt v. Yates, 4 Edw. Ch. 134; *Jacobs v. Turpin*, 83 Ill. 424; *Litchfield Bank v. Peck*, 29 Conn. 384; *Eastern Bank v. Capron*, 22 Conn. 639; *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 237; *Tuckerman v. Brown*, 33 N. Y. 297; *Atty. Gen. v. North American L. Ins. Co.* 82 N. Y. 172; *Whittlesey v. Delaney*,

§ 391. In what name to sue.

Where authorized by statute, or by the court appointing him, the receiver may sue in his official name, and where not so authorized he must sue in the name of the person or corporation to whose rights he has succeeded, for his use as receiver.¹

§ 392. Necessary allegations.

He must allege and show (1) his appointment as receiver, his qualification to act by giving the required bond if so ordered, and any other necessary prerequisites to his right of action under the statute or circumstances of the particular case; (2) he must also allege and show a legal or equitable right in himself to sue in his official capacity as the representative of the parties in whose interest the suit is brought or that, but for his appointment, such parties had a legal or equitable cause of action and right to enforce such right.²

§ 393. Form of allegations.

The necessary averments should be stated in such clear and specific form as that issue may be taken thereon. The facts being jurisdictional, they should be stated with such sufficient fullness and clearness as will enable the court to see without inference plaintiff's right to recover.³

§ 394. Limitations on power to sue.

The receiver's power to sue is not an unlimited one when

78 N. Y. 571; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46; *Williams v. Babcock*, 25 Barb. 109; *Curtis v. McIlhenny*, 5 Jones, Eq. 290; *Coops v. Bowles*, 28 How. Pr. 10; *Falkendach v. Patterson*, 48 Ohio St. 359; *Wardle v. Hudson*, 96 Mich. 432; *State, Shepard, v. Sullivan*, 120 Ind. 197. See also § 70, *ante*.

¹ See, as to suit in his own name when authorized by court, § 72, note 1, p. 161, *ante*, and note 3, p. 162, *ante*; *Baker v. Cooper*, 57 Me. 388.

See, as to suit in his own name when authorized by statute, § 72, note 2, p. 161, *ante*.

As to suits where required to bring in the name of the person or corporation, see § 72, note 3, p. 161, *ante*; also *Wilson v. Welch*, 157 Mass. 77; *Battle v. Davis*, 66 N. C. 252; *Yeager v. Wallace*, 44 Pa. 294; *Harrell v. Kent*, 71 Ind. 602; *Moriarty v. Kent*, 71 Ind. 601; *Garver v. Kent*, 70 Ind. 428; *Manlove v. Burger*, 88 Ind. 213; *Harland v. Bankers' & M. Teleg. Co.* 33 Fed. Rep. 199, 33 Fed. Rep. 305.

² See § 71, *ante*.

³ See §§ 11, 14, *ante*.

granted by leave of court. He must confine himself to such remedies as the law gives touching the matter in controversy, and, while the court clothes him with power to sue, it cannot create a remedy, or change the remedies to suit his convenience. His suit is legal or equitable, according to the subject-matter. In bringing parties into court, and his rights when in court, are precisely those of any other person, and the proof required is just as imperative in all respects. He is favored as to possession, but otherwise has no special privileges.¹

§ 395. Suits against receiver; leave to sue.

When not otherwise provided by statute, the court will not, as a rule, permit the receiver to be sued without leave of court granted on petition filed for that purpose. The petition in such case must show a good, or at least a probable, cause of action, and such reasons as shall seem to the court sufficient that the matter should be passed upon by a court of law or other court than the one appointing the receiver. The reasons for this rule are that the receiver is an officer of court, and the due and proper admin-

¹ In *Harland v. Bankers' & M. Teleg. Co.* 32 Fed. Rep. 305, it is held that a receiver appointed in a foreclosure proceeding cannot maintain a bill for an accounting for damages suffered by the mortgagor, growing out of a breach of contract to construct certain lines of telegraph. Equity will not entertain a bill to try title to property in the possession of one claiming adversely, though the complainant seeks relief in the nature of removing clouds upon title.

In *Tyler v. Hamilton*, 63 Fed. Rep. 187, a receiver of a corporation in a foreclosure proceeding was held not competent to contest the validity of leases executed by a corporation to a director thereof. In such case he is not a representative of the creditors and in equity not entitled to maintain the suit against the lessee's rights.

In *Caldwell v. McWhorter*, 84 Ky. 130, a receiver was held not to have

power even under the order of court to bring an action involving the title to real estate against third parties, or to submit a controversy with third parties, concerning title to real estate, and, without the consent of the real parties, bind them by the judgment which may be rendered.

In *Conley v. Deere*, 7 Lea, 274, an action was brought by the receiver to recover possession of certain goods and it was held that replevin in a common law court against the party having in fact a superior right to the possession of the property could not be maintained. This decision was based on the ground that a court of law should not be called upon to assert and indicate the dignity and jurisdiction of the court of chancery in an action of replevin. In a word, the chancery court having jurisdiction should exercise such jurisdiction if a proper case existed.

istration of the estate demands that he shall not be harrassed by litigation. All reasonable facilities for being heard *pro interesse suo* being afforded by the court appointing. In such case, leave having been granted, it is necessary to allege such leave, and the allegation, as elsewhere seen, is jurisdictional, though the decisions upon the point are not harmonious.¹

¹ In *Keen v. Breckenridge*, 96 Ind. 69, where the complaint was filed against a receiver in his official capacity upon a money demand, which did not allege that leave to bring suit had been granted by the court, was held to be bad upon demurrer based upon the following cases: *DeGroot v. Jay*, 30 Barb. 488; *Higgins v. Wright*, 43 Barb. 461; *Barton v. Barbour*, 3 MacArth. 212, 36 Am. Rep. 104; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672.

In *Lehigh Coal & Nav. Co. v. Central R. Co.* 38 N. J. Eq. 175, the petitioners claimed to have furnished the former receiver of an insolvent railroad company with materials for the use of the road. They applied for an order on the receiver for payment and also for an order giving them leave to sue him at law for damages alleged to have been sustained by reason of the nonfulfillment of his predecessor's contract for materials similarly supplied. The court held (1) that the court on granting the petition would, by a preliminary examination of the transaction, determine whether the matter could be disposed of in the court appointing the receiver; and (2) that the present receiver was not liable to a suit at law on the contract of his predecessor.

In *Palys v. Jewett*, 32 N. J. Eq. 302, it was held that a cause of action sounding merely in tort against a receiver appointed by a court of chancery, might be prosecuted against the receiver in an action at law, but that

such action could not be brought without permission of the chancellor, which would be granted, unless the claim preferred was manifestly unfounded and vexatious. In this case there was an exhaustive examination of the law in regard to the trial of questions of damages in a court of chancery to which is a valuable note by the reporter citing many cases bearing upon the question.

In *Hubbell v. Dana*, 9 How. Pr. 424, it was held that leave to prosecute a suit against the receiver should have been obtained, but the irregularity might be waived by a general notice of appearance.

In *Re Young*, 7 Fed. Rep. 855, it was also held that, after submitting to the jurisdiction of the court, it was too late to complain that the bringing of the suit without leave was a contempt.

In *Elkhart Car Works v. Ellis*, 118 Ind. 215, where, in an action to quiet title, the receiver appeared and joined issue without objecting that leave to sue him was not first obtained, was a waiver of such objection. In this case the doctrine of *Keen v. Breckenridge*, 96 Ind. 69, while not overruled, was held not to apply to an action to quiet the title to real estate.

In *Potter v. Bunnell*, 20 Ohio St. 150, it was held that an action for injuries against the receiver, exercising franchises of a railroad, must be determined by the principles applicable to a like action against the company when operating its own road.

In *Kinney v. Crocker*, 18 Wis. 75,

suit was brought to recover for injuries to the plaintiff from the negligence of the servants of the defendant receiver, while operating a railroad under orders of the United States district court. The court say: "In all such cases it (the court) will sometimes punish as for a contempt in an attempt to disturb the possession of its officers; it will sometimes restrain suits at law and draw to itself all disputed claims in respect to the subject-matter; and sometimes it will allow the suits at law to proceed. But in all these cases it is not a question whether equity will exercise its own acknowledged jurisdiction of restraining suits at law under some circumstances and itself dispose of the matter involved. It follows that, although a plaintiff in such a case desiring to prosecute a legal claim for damages against a receiver might, in order to relieve himself from the liability to have his proceedings arrested by an exercise of this equitable jurisdiction, very properly obtain leave to prosecute, yet his failure to do so is no bar to the jurisdiction of the court of law and no defense to an otherwise legal action on the trial. There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the court of chancery, but only obtains a judgment at law on a claim for damages." The court of appeals of New York in *Chautauque County Bank v. Risley*, 19 N. Y. 369, expressly declined to follow the doctrines of the United States Supreme Court and allowed a suit in ejectment to be prosecuted against the receiver under a claim of paramount title.

In *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225, the same principle was held. It did not appear in that

case whether any leave was asked or not. It was held, however, that if the chancery court had desired to restrain the prosecution of the action it could have been done, and not having been done, it was presumed that it was deemed wise to leave the matter for determination by the court in which the suit was pending.

It was held in *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672, that the fact that the receiver was in the possession of, and operating a railroad, and was conducting the business of a common carrier, did not take the case out of the rule that he was answerable only to the court which appointed him, and could not be sued without its leave. The claim of the plaintiff which was for personal injuries received while traveling on the road operated by the receiver was held to stand precisely on the same footing as expenses incurred in the execution of the trust and must be adjudicated and satisfied in the same way.

In *Brown v. Rauch*, 1 Wash. 497, it was held that a receiver could not be sued except upon leave of the court first obtained and this leave was a jurisdictional fact which could not be waived by the receiver and could be raised at any stage of the case in either court.

In the following cases the question as to first obtaining leave of court was held not to be a jurisdictional fact.

In *Lyman v. Central Vermont R. Co.* 59 Vt. 167, it was held that the failure to obtain leave to sue the receiver was not a bar to the jurisdiction of a court of law and no defense to an otherwise legal action. The court say: "There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the court of chancery, but

§ 396. Actions against receiver under void appointment.

Where a receiver has been appointed and the appointment is void by reason of the provisions of the statute regulating the appointment of receivers not having been complied with, and the receiver has collected money, acting in the capacity of receiver from tenants for rent, it may be recovered from him in an action therefor, by the person entitled thereto, and this too, though he might also have an action against the tenants.¹ It is probable

only an attempt to obtain a judgment at law in a claim for damages." This decision is based on *Kinney v. Crocker*, 18 Wis. 75; *Angel v. Smith*, 9 Ves. Jr. 385; *Chautauque County Bank v. Riskey*, 19 N. Y. 389; *Camp v. Barney*, 4 Hun, 373.

In *Roxbury v. Central Vermont R. Co.* 60 Vt. 121, an action was held proper against a receiver for obstructing a crossing, although leave was not obtained to bring the suit.

In *Martin v. Atchison*, 2 Idaho, 590, it was held that a receiver cannot be sued without obtaining a permission from the court by whom the appointment was made. It is said "If such proceedings can be tolerated then the appointment of receivers by courts would be a useless ceremony and a farce. The plaintiffs are not without a remedy for they may ask the court to allow the receiver to be made a party under such restrictions as the court deems best for the preservation of the property, of its own authority and the protection of its officers." The decision is based upon *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672, which was founded on *Davis v. Gray*, 83 U. S. 16 Wall. 203, 21 L. ed. 447.

The case of *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672, though not the first case, is one of the leading cases holding that a receiver cannot be sued without leave of the court of equity which appointed him. It is

held that a suit brought without leave to recover a judgment against a receiver for a money demand is virtually a suit, the purpose of which is, and the effect of which may be, to take the property of the trust from the receiver's hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors, or the orders of court, which is administering the trust property. "We think therefore" the court say, "that it is immaterial whether the suit is brought against him (the receiver) to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained." The decision is based upon *Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 822, and *Ames v. Birkenhead Docks*, 20 Beav. 332. In this last case Lord Rommely, Master of the Rolls, said that it was an idle distinction that the rule forbidding any interference with property in the course of administration in the court of chancery only applies to property actually in the hands of the receiver and declared that the rule applied to debts, rents, and tolls which the receiver was appointed to receive.

¹In *Holcombe v. Johnson*, 27 Minn. 353, a receiver was appointed in a supplementary proceeding over specific property of the judgment debtor and the order appointing the receiver was subsequently reversed on appeal.

this rule would not be applicable in a case where the appointment was only voidable, for in such a case the attack would be collateral.¹ An order void for want of jurisdiction can be attacked in any proceeding.²

It was held that the action of the lower court was not void, but remained in force until reversed, and furnished a protection to the receiver for acts done under it in strict conformity with the requirements of the order as long as the order was in force.

In *Buckley v. George*, 71 Miss. 580, it is held that where an order appointing a receiver is appealed from and a supersedeas granted the effect is to retroact and suspend the order by which the receiver was appointed by which there was no longer any efficacy in the decree to uphold the possession of the receivers, and the right of the party from whom the property is taken is revested in him. Cf. *State v. Johnson*, 13 Fla. 38; *Blondheim v. Moore*, 11 Md. 365; *Everett v. State*, *McKaig*, 28 Md. 190. See also *Johnson v. Powers*, 21 Neb. 292.

In *First Nat. Bank v. United States Encaustic Tile Co.* 105 Ind. 227, it is held that an erroneous appointment of a receiver is not void, but voidable, as where the court had jurisdiction of the subject-matter and of the parties. *Cook v. Citizens' Nat. Bank*, 73 Ind. 256; *Howard v. Whitman*, 29 Ind. 557; *Pressley v. Lamb*, 105 Ind. 171.

In *O'Mahoney v. Belmont*, 62 N. Y. 182, it is held that in the matter of the county and a person appointed receiver it is no objection that the appointment was void in a case where it appeared that the receiver was appointed and obtained control of the fund without the consent, and contrary to the wishes, of the parties.

¹ In *Commercial Nat. Bank v. Burch*,

141 Ill. 519, it is held that where the court, appointing a receiver for an insolvent corporation, has jurisdiction of the subject-matter and of the parties, the order appointing him cannot be questioned collaterally, no matter how erroneous it may be. It cannot be attacked upon appeal from an order refusing to give an intervening petitioner a preference in payment on his claim of an equitable lien on the assets of the corporation. See also *Richards v. People*, 81 Ill. 551; *St. Louis & S. Coal & M. Co. v. Sandoval Coal & M. Co.* 111 Ill. 32.

² In the case last cited the doctrine is laid down that a judgment or decree rendered where jurisdiction is wanting of either the subject-matter or parties is void and a nullity, and all acts performed under it are void and no right can be divested by it or acquired thereunder. Cf. *Mulford v. Stalzenback*, 46 Ill. 306; *Campbell v. McCahan*, 41 Ill. 45; *Johnson v. Baker*, 38 Ill. 98; *Chambers v. Jones*, 72 Ill. 275; *Grand Tower Min. & T. Co. v. Schirmer*, 64 Ill. 106; *Haywood v. Collins*, 60 Ill. 328; *Chase v. Dana*, 44 Ill. 262; *White v. Jones*, 38 Ill. 159; *Ourtiss v. Brown*, 29 Ill. 229; *Pardon v. Dwire*, 23 Ill. 572.

Otherwise, however, where there is a mere error or irregularity. *Adams v. Larrimore*, 51 Mo. 130; *Wenner v. Thornton*, 98 Ill. 156; *Harris v. Lester*, 80 Ill. 307; *Wing v. Dodge*, 80 Ill. 564; *Hernandez v. Drake*, 81 Ill. 34. Cf. *Neeves v. Boos*, 86 Wis. 318; *Stanley v. National Union Bank*, 115 N. Y. 122; *Greenawalt v. Wilson*, 52 Kan. 109.

§ 397. Form of judgment against receiver.

Where the liability of a receiver in his official capacity is established, it is in effect a liability *in rem* against the receivership property or fund, and the order of court requires the judgment to be satisfied out of such property or fund according to the equities therein as finally established.¹

§ 398. Proceedings in original cause when.

It rests in the sound judicial discretion of the court whether it will permit suit to be brought against the receiver, or compel the applicant to come in by petition in the cause, and there determine, in an appropriate proceeding, by jury, reference to the master, referee, or otherwise, the rights of the party whether they relate to questions of fact or damages. Such proceedings are in effect separate proceedings, subject to appeal.²

In *Texas & P. R. Co. v. Gay*, 86 Tex. 571, 25 L. R. A. 52, the court exhaustively discusses the question of jurisdiction, not only as between courts, but also as to what constitutes jurisdiction over the subject-matter, as well as jurisdiction over the parties to the suit, and also holds that a receiver appointed under a void order must be deemed to have been simply the agent of the railway company over whose property he was appointed, and it is liable for injuries resulting from his management of the railway to the same extent and in the same manner as if such receiver were made agent in the ordinary course of business; and the same rule applies where the receiver is appointed by collusion, in such case he being treated as the agent of the parties procuring the appointment.

¹ In *Farmers' Loan & T. Co. v. Central R. Co.* 7 Fed. Rep. 587, the discharge of a receiver was held to be a bar to an action brought against him. The company to whom the

property is turned over, however, is liable, if received by it subject to claims of the receiver. The court says: "If the receiver had been discharged and the property turned over to the new company unconditionally and without reservation I am at a loss to see what legal remedy claimants without established liens shall have, but the court did not in this case so turn over the property. It would have been a most unwise and unjust proceeding to have done so, leaving just claims and liabilities incurred by a receiver of its own appointment, without any provision whatever to enforce them." Any demand against the receiver which the claimant has a right to establish as a lien against the receivership property may, by leave of court, be presented in the original case.

² In *Jordan v. Wells*, 8 Woods, 527, it was held that a receiver ought not to be sued, unless a petition for leave has been filed which states a prima facie case against him.

§ 399. Right of set-off.

The equitable right of set-off is recognized in all proceedings by the receiver, on the ground that he takes the receivership property subject to all equities against it.¹

§ 400. Petition of receiver for authority.

Except where power is given to the receiver in the order of appointment or by statute, the proper practice is for the receiver to apply by petition to the court for specific authority and direction in all matters involving his official action and duty where the result of his action may seriously affect the receivership property or fund. The interest of the parties and his responsibility to the court require this. In such case the order of court is based upon the petition and should so recite.²

¹ In *Newcomb v. Almy*, 96 N. Y. 308, it appeared that when the plaintiff was appointed a receiver of an insurance company, the company held certain claims against the defendant and the defendant held endowment policies against the company which were not yet matured. In an action upon the claims against the defendant brought by the receiver it was held that the defendant was not entitled to set off the reserve value of the policies. This decision is based upon the principle that the money was not due to the policy holder in such a sense that he could avail himself of it as a set-off; but in *People v. Security L. Ins. & A. Co.* 78 N. Y. 114, it was held that the holder of an unmatured life policy was a creditor and entitled to share with other creditors in the assets; that he was not regarded as a partner of the company; that he was damaged by the insolvency of the company, and in ascertaining the amount of damage resort could be had to the tables used in life insurance business, and where the receiver held the notes of such a policy holder in part payment

of premiums, it is proper to offset the amounts due on such notes against the value of the policies and pay a dividend upon the balance only.

In *Com. v. Shoes & Leather Dealers' F. & M. Ins. Co.* 113 Mass. 181, the property of an insurance company had been sequestered and placed in the hands of a receiver, and it was held that the amount of loss before that time sustained under the policy of the company could be set off against the debt from the assured to the company, even where the company held collateral security.

In *Scammon v. Kimball*, 93 U. S. 362, 28 L. ed. 483, a person having a set-off against a corporation adjudicated a bankrupt, has a right to such set-off against the assignee equally available to him as a company.

In *Hughitt v. Hayes*, 136 N. Y. 163, it is held that the insolvency of one party and the appointment of a receiver does not destroy the equitable right of set-off which otherwise existed prior to the appointment.

² See § 25, p. 83, note 2, *ante*; *People v. St. Nicholas Bank*, 76 Hun, 523; *Missouri P. R. Co. v. Texas & P. R.*

§ 401. Application for directions.

The receiver, being an officer of the court and at all times subject to its orders and directions, has an undisputed right to apply to the court for instructions concerning the receivership interests in his charge, and for the safekeeping of which he is responsible, and especially so where there are conflicting interests, rights, liens, and other matters about which future contests may arise.¹

§ 402. Receiver as manager.

Where the receiver is also manager, usually in the matter of railways, and where the scope of duties pertaining to the receivership is comprehensive and involved, greater latitude is allowed the receiver, and his discretionary powers necessarily largely increased, but in such case the order should be correspondingly latitudinous, so as to afford ample protection where his action is called in question. It will be found much easier to fortify his action in advance by general or special orders than to justify his action afterwards when called in question.²

§ 403. Interpleader by receiver.

Where two parties claim the same property or fund in the hands of a receiver, it is proper for the receiver to file a bill of interpleader and compel them to determine as to each other which has a superior right.³

Ob. 81 Fed. Rep. 864; *Re Van Allen*, 87 Barb. 225; *Cammack v. Johnson*, 2 N. J. Eq. 168.

¹ In *Smith v. New York Consolidated Stage Co.* 28 How. Pr. 877, the court say: "The court has sanctioned the practice of the receiver to ask for instructions regarding the receivership business."

In *People, Atty. Gen., v. Security L. Ins. & A. Co.* 79 N. Y. 267, the court say: "Since the receiver is an officer, or, as he is sometimes called, the hand of the court, it would be singular if he could not at such stage go to it with his complaint or for instructions in regard to any matter touching the fund placed in his custody, and more especially when, as

in the case before us, it is in danger through his own error of being unfairly distributed."

² *Central Trust Co. v. Ohio C. R. Co.* 28 Am. & Eng. R. Cas. 686; *Jackson v. De Forest*, 14 How. Pr. 81; *Allen v. Hawley*, 6 Fla. 164; *Heather-ton v. Hastings*, 5 Hun. 459; *Marten v. Van Schaick*, 4 Paige, 479; *Lehigh Coal & Nav. Co. v. Central R. Co.* 41 N. J. Eq. 167; *Langdon v. Vermont & C. R. Co.* 54 Vt. 593; *Clarke v. Central R. & B. Co.* 66 Fed. Rep. 16; *Platt v. Philadelphia & R. R. Co.* 65 Fed. Rep. 660; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 59 Fed. Rep. 514.

³ In *Winfield v. Bacon*, 24 Barb. 154, the receiver had a fund in his hands

§ 404. Possession as to third parties.

Where the receiver holds property, his possession is the possession of the court, and any equitable rights therein claimed by third parties must be asserted by petition and determined by the court appointing the receiver. It is also an equally well recognized rule that where it is alleged and shown for good cause that property should not pass to a receiver, the court may, on petition, release the same.¹

realized from the sale of land to which there were two claimants, each of whom had commenced a separate action against him regarding the fund, and had obtained an injunction to prevent him from paying it over. In such case it was held that a bill of interpleader by the receiver might be maintained against the rival claimants to compel them to interplead and settle the rights between themselves.

¹In *Thompson v. McCleary*, 159 Pa. 189, it is held that a creditor having execution under a judgment should apply to the court which appointed the receiver and ask for a discharge of the property out of its custody so that he may proceed against it. The same doctrine is recognized in *Smith v. Earl of Effingham*, 2 Beav. 232.

In *Re Christian Jensen Co.* 128 N. Y. 550, it was held that when property had passed to the actual possession of the receiver it could not, without leave of the court first obtained, have been replevied from him in an action against him. The only remedy would have been by an action commenced with the leave of court, or by petition to the court appointing the receiver. Citing *Noe v. Gibson*, 7 Paige, 518; *Riggs v. Whitney*, 15 Abb. Pr. 388; *Chautauque County Bank v. Risley*, 19 N. Y. 869; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Evelyn v. Lewis*, 3 Hare, 472; *Ex parte Cochran*, L. R. 20 Eq. Cas. 282.

In *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160, it was held that whether certain land belonging to a mortgagor should pass into the hands of a receiver could be determined only by the court appointing the receiver. The court say: "If a creditor believes that the property was not legally mortgaged, or for any good reason should not pass into the hands of the receiver, his duty is to apply to the court having appointed the receiver to ask its discharge out of custody, in order that he may proceed against it." See also *Re Day*, 84 Wis. 638. In this case shingles were lawfully in the possession of the receiver, and the court held if there had been a mistake in the delivery and they belonged in fact to another party than the debtor, the remedy of the claimant was by application to the court for redress or for leave to sue.

In *Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322, it was held that where real estate was in custody of the receiver appointed by a court of chancery, the sale thereof was improper under an execution issued in a judgment at law. It is held that when a party is prejudiced by having a receiver put in his way, the practice has been either to give him leave to bring ejectment or permit him to be examined *pro interesse suo*. If persons claim to have prior legal or

equitable interests to the property in the hands of the receiver, and they desire to avail themselves of such rights, they must apply to the court for protection, even though their right to the possession is clear; and the same practice applies where the property claimed consists of goods and chattels, or other personalty, as to real estate. The court say: "The settled rule, also, appears to be that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the court, pending the litigation, by the appointment of a receiver, or by sequestration, the title is bound from the filing of the bill; and any purchaser, *pendente lite*, even for a valuable consideration, comes in at his peril."

In this case the court examined extensively the English and American doctrine in regard to the possession of the receiver and the interference therewith and the remedies of claimants thereto.

In *Russell v. East Anglian R. Co.* 3 Macn. & G. 104, property in the possession of the receiver was seized under execution on judgments against the debtor. It was held that the established rule was that no party could question any order or process of court by disobedience; that it was not competent for any one to interfere with the possession of the receiver or disobey any order of court, on the ground that the orders were improperly made. The proper course to question their validity was open to all, and this course must be pursued. "It was perfectly open to the plaintiffs to have applied to the court to be heard *pro interesse suo*, or to have been heard on a summary application for leave to levy their execution, notwithstanding the possession of the receiver."

In *Porter v. Kingman*, 126 Mass. 141, it is held that a person who has

purchased property subject to a mortgage given by the owner to a bank, cannot maintain a bill in equity against the receivers of the bank for a cancellation of the mortgage, alleging as a ground false and fraudulent representations of the bank, but if he has any remedy at all he must proceed by petition in the court in which the receiver was appointed. Equitable rights which are contended as superior to the title made by order of court cannot be passed upon except in the cause in which that title is created, and cannot be set up in an independent suit.

Cf. *Atlas Bank v. Nahant Bank*, 23 Pick. 480; *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *Wiswall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 822; *Nes v. Gibson*, 7 Paige, 518; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Russell v. East Anglian R. Co.* 3 Macn. & G. 104; *Hills v. Parker*, 111 Mass. 508.

In *Columbian Book Co. v. De Golyer*, 115 Mass. 67, it was held that before property of a corporation in the hands of a receiver could be taken from such receiver and applied to the payment of creditors, a petition in equity in the cause in which the receivers were appointed was necessary.

In *Hills v. Parker*, 111 Mass. 508, an action of replevin was maintained against an agent of the railroad company, whose property was in the hands of receivers, without obtaining leave of court, where it appeared that the corporation had no interest in the property replevied, although it was in use by the receiver. It was held that leave to bring an action would be granted by a court of chancery as of course, unless it was clear that there was no foundation for the claim. The appointment of receivers entitle them to the protection of the court as to the property they were directed to

§ 405. Acts outside of receiver's duty.

Where the receiver commits acts outside of the line of duty, as where he takes and holds possession of property not included in the order of appointment and to which the debtor never had title, he is not entitled to the protection of the court, is a trespasser and liable as such. He is not, however, a trespasser if he takes possession of property under an improvident order of court, or at least not liable for damage.¹

§ 406. When receiver refuses to act.

When a receiver fails to prosecute officers of a corporation for neglect of duty or illegal acts the right of action is in the party interested making the receiver a defendant.²

take possession of, but does not extend to property not embraced in the decree and of which the debtor never had any title. *Parker v. Browning*, 8 Paige, 888; *Paige v. Smith*, 99 Mass. 395; *Leighton v. Harwood*, 111 Mass. 67.

In *Atlas Bank v. Nahant Bank*, 28 Pick. 480, it appeared that attachment suits were brought against an insolvent bank, and the receivers filed a petition praying that the attachment might be dissolved and the respondents be restrained from other attachments; that the petition was a distinct proceeding, unconnected with the original suit against the bank, and was held to be irregular, but that the receivers were entitled to proceed in a summary mode, by a petition filed in the original suit, to obtain a decision of the court upon the rights of attaching creditors, and that a supplemental bill was not necessary.

¹In *Ft. Wayne, M. & O. R. Co. v. Mellett*, 92 Ind. 535, it was held that where a receiver was in possession of land under decree of the circuit court of the United States no action could be maintained in the state courts to recover possession thereof. In such case the court which holds by its re-

ceiver is the only court to try the question of title.

In *Staples v. May*, 87 Cal. 178, it is held that if the receiver appointed in a mortgage foreclosure works ores in lands of the mortgagor, which are not included in the mortgage foreclosed, he becomes liable as a trespasser for the net proceeds of the ore extracted and the general creditors of the mortgagor may avail themselves of such liability by proceedings supplemental to execution.

In *Kenney v. Ranney*, 96 Mich. 617, it is held that a receiver should see to it that he sells none but the property covered by the mortgage under the order of court, for its sale, and an action of trover will lie against him for the value of other property held by the mortgagor as bailee and delivered by him to the receiver without demand and without order of court. Cf. *Gibbons v. Farwell*, 68 Mich. 344; *Pingree v. Detroit, L. & N. R. Co.* 66 Mich. 148; *Allen v. Kinyon*, 41 Mich. 281; *Scudder v. Anderson*, 54 Mich. 123; *Hake v. Buell*, 50 Mich. 89; *Daggett v. Davis*, 58 Mich. 85; *Gutsch v. McIlhargy*, 69 Mich. 377.

²In *Fisher v. Andrews*, 37 Hun, 176, an action was brought by the plaintiff

§ 407. Leave to compromise.

The court in the interest of the estate may authorize and empower the receiver to compromise disputed and doubtful claims, by receiving less than the amount due if it shall appear expedient so to do and to the best interest of creditors, stockholders, or those interested.¹

§ 408. Power to enforce assessments.

The receiver of an insolvent mutual fire insurance company has

to recover a sum of money due her as widow of a member of a mutual benefit association. The action was brought against the trustees and receiver. The complaint alleged in substance negligence of the trustees and that they had converted and applied to their own use moneys collected under an assessment for and belonging to the plaintiff without right or authority. It was held that the complaint was properly dismissed because of its failure to allege that plaintiff had requested the receiver to prosecute the defendant and that he had refused to do so, and that she had applied to the court for leave to sue the defendants and that the same had been granted or refused. The court say: "The receiver represents the corporation, and also the creditors, and the funds and causes of action which became vested in him on his appointment are *in custodia legis* and should not be diverted and taken from his hands or placed beyond the control of the court whose duty it is to see that all the funds of the corporation are justly and equitably distributed among its creditors and members. * * * If it had been made to appear that the receiver was in league with the other defendants or had been guilty with them in misappropriating the funds of the company that would perhaps be a sufficient excuse for not applying to him to prosecute the defendants in a proper

action." *Greaves v. Gouge*, 69 N. Y. 154; *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

¹ In *Monitor Furnace Co. v. Peters*, 40 Ohio St. 575, a receiver of a corporation was appointed to administer the estate for the benefit of creditors and stockholders. Before the receiver's appointment the company made sale of its real estate and other property for the alleged purpose of defrauding creditors. Two years after the appointment a judgment creditor filed a bill for the purpose of declaring the sale void in the same court that appointed the receiver, in which the stockholders, receivers, and creditors were made defendants, and the bill was sustained on the ground that it was substantially an application to the court to direct the receiver to do his duty in the case stated. In this case the court can make the proper order as effectively and justly as if instituted by the receiver.

Re Croton Ins. Co. 3 Barb. Ch. 642, a receiver of an insolvent corporation, on application, was authorized to compromise disputed and doubtful claims by the allowance of so much of said claims as to him should seem just and equitable and to compromise with debtors who are unable to pay in full upon receipts any part of their debts, if it should seem reasonable and for the best interest of creditors.

power to make an assessment upon the premium notes necessary to pay the debts of the company to the same extent as possessed by the board of directors; but his power is not more extensive than that of the board. In such case his power does not depend upon the order of court but the existence of such facts and circumstances as render the assessment necessary. He acts ministerially and not judicially, and in enforcing the assessment must allege such facts as would entitle the company to sue.¹

¹In *Thomas v. Whallon*, 81 Barb. 172, the receiver of a mutual insurance company in making an assessment upon the premium notes is held to be an actor and his authority depends not upon the order of court, but upon the existence of facts making the assessment necessary and proper. In ordering the receiver to make the assessment courts do not adjudicate upon the liability of the company or determine the amounts for which assessments shall be made, at the ratio of an assessment, but merely sanction and authorize the acts of the receiver who acts ministerially and not judicially.

In *Williams v. Babcock*, 25 Barb. 109, it is held that the receiver of a mutual insurance company, by his appointment, has power to make assessments upon premium notes and determine the time of payment in the same manner as the directors had, and is authorized to give notice in the same manner, but the appointment does not determine the amount of indebtedness or the time of payment. If the obligation to pay is determined by the premium note upon an assessment and notice, it is the receiver's duty to proceed forthwith and make an assessment and give the notice. This is a prerequisite to an action on the note; otherwise there would be no breach on the part of the maker and these things are necessary allegations in an action against the maker.

In *Kinsela v. Cataract City Bank*, 18 N. J. Eq. 158, it appeared that a sum of money was placed in a bank as a special deposit to meet a contingency of the bank which never happened, and the receiver was required to repay the sum to the depositor.

In *Wood v. Standard Mut. L. S. Ins. Co.* 154 Pa. 157, a decree was rendered ordering the receiver to collect an assessment from members of the company, and in such case a liberal allowance should be made for uncollected assessments, expenses, etc.

In *Bangs v. Duckinfield*, 18 N. Y. 592, an assessment made by a receiver of a mutual fire insurance company under an order of court on application of the receiver without notice is held to be upon the same footing as if made by the board of directors and not conclusive upon the person assessed as a judicial determination.

In *Sands v. Sanders*, 28 N. Y. 416, it is held that a general assessment is good by which the receiver declares each premium note is assessed to the full amount thereof.

In *Downs v. Hammond*, 47 Ind. 131, suit was brought by a receiver of a mutual fire insurance company to collect an assessment on a premium note and it was held that the complaint must show on its face that the court from which the receiver derives his authority has determined the validity of the claims for which the assessment is made. The amount of claims which

409. Leave to sell.

Where leave is given to the receiver to sell subject to the order of court, an order of confirmation by the court is necessary in order to transfer the title. The sale in such case is conditional and the purchaser buys subject to the condition, but as in the case of minors the contract is enforceable against him.¹

§ 410. Leave to contract debts and liens.

The receiver without leave of court has no power to create indebtedness and charge the receivership property with the payment thereof. The court may in its discretion ratify the act of the receiver afterwards, in which case the effect is the same as previous leave given. The order and not the act gives the transaction validity. As to the existing mortgage liens, and the power to displace them by prior liens, the power of the court is limited, as elsewhere seen, to legitimate operating expenses.²

the receiver or court will allow as just demands against the company, together with any indebtedness previously allowed by the directors of the company as shown by their books must be ascertained before an assessment can be made to pay such indebtedness.

In *Manlove v. Buryer*, 38 Ind. 211, it is held that under the statute of Indiana the receiver of a mutual insurance company is authorized to sue in his own name in bringing an action against the stockholders of a mutual insurance company. Also, that in an action by a receiver to recover assessments he must allege all the facts necessary to show a liability on the premium notes and that the claim for losses had been adjusted, or were justly due to the parties making or setting up the claims.

¹ In *Koons v. Northern Bank*, 83 U. S. 16 Wall. 196, 21 L. ed. 465, it is held that if the receiver omit to perform his whole duty by which the parties are injured, or if he commits a fraud upon the court and the rights of third parties

have intervened to prevent the setting aside of the transaction, the remedy is against the officer personally on his official bond.

In *Phelps v. Masterton*, 8 Robt. 527, it was held that a receiver of a corporation to which a note was given, cannot recover upon such note after he has sold the same at public auction to a bona fide purchaser.

In *Hanks v. Blattner*, 84 Ill. App. 394, a receiver was held to be authorized to bring suit without special leave of court, under Ill. Rev. Stat. chap. 82, § 25. In this case it appeared that the receiver had made a sale of property pursuant to the order of court, and the purchaser had failed to give a note due for the property pursuant to the terms of sale, and suit was brought therefor.

² In *Rogers v. Wendell*, 54 Hun, 540, an action was brought to dissolve the corporation in which a receiver was appointed, who employed a person to take charge of the property of the company at a designated place and pay certain disbursements necessary. This

§ 411. Leave to issue certificates.

The court may, however, under certain limitations and restrictions, empower the receiver to issue receiver's certificates and bind the receivership funds for their payment, but in such case express authority must be given the receiver, and his expenditure of the money derived therefrom or use of the certificates must strictly follow the order and direction of the court.¹

employment was continued for some time by the person so employed, he making reports to the receiver weekly and drawing drafts upon him for various sums until the death of the receiver. An action was brought by the employee against the executor of the receiver for services and disbursements and it was held that the receiver assumed a personal liability on account of services and disbursements. This case is based upon analogous cases applicable to administration and trustee matters as follows:

Cf. Schmittler v. Simon, 101 N. Y. 557; *Willis v. Sharpe*, 113 N. Y. 591; *Davis v. Storer*, 16 Abb. Pr. N. S. 227; *Noyes v. Blakeman*, 6 N. Y. 580; *Mygatt v. Wilcox*, 45 N. Y. 309; *Bowman v. Tallman*, 2 Robt. 385; *People v. Universal L. Ins. Co.* 30 Hun, 142; *Kedian v. Hoyt*, 38 Hun, 145; *Ryan v. Rand*, 20 Abb. N. C. 314; *Pullen v. Royal Baking Powder Co.* 114 N. Y. 4.

The principle upon which the administrator, trustee, or receiver is held liable in the foregoing cases is that there is no responsible principal back of them for whom they may contract and against whom the creditor may force his demand. A receiver cannot, of his own motion, contract debts chargeable upon the fund in litigation and while a court may allow expenses incurred by a receiver for the preservation of the property, it is nevertheless the order of court and not the act of the receiver which creates the charge and upon which its validity

depends. *Vilas v. Page*, 106 N. Y. 451. *Cf. Wyckoff v. Scofield*, 108 N. Y. 630.

In *Cowdrey v. Galveston, H. & H. R. Co.* 93 U. S. 852, 23 L. ed. 950, it is held that the receiver is not authorized, without previous direction of the court, to incur any expense, on account of property in his hands, beyond what is absolutely essential to its preservation as contemplated by his appointment.

In *Ryan v. Rand*, 20 Abb. N. C. 313, the receiver was held personally liable for fees of a stenographer employed by him on the ground that there was no authority from the court making the plaintiff's demand a charge upon the estate.

¹In *Union Trust Co. v. Chicago & L. H. R. Co.* 7 Fed. Rep. 513, under a special order of court, receivers' certificates were issued, placed in the hands of the payee for negotiation and sale, and subsequently were purchased by the plaintiff for forty cents on the dollar, he having notice of the order under which the certificates were issued. It was held that the purchaser took subject to all equities between the receiver and payee. The negotiation and sale of certificates is a trust personally to the receiver and he cannot delegate it to another and relieve himself from responsibility.

In *Bank of Montreal v. Chicago, C. & W. R. Co.* 48 Iowa, 518, the receiver was authorized to borrow such sums of money as were necessary for

§ 412. Trust property held by receiver.

If property is held by a corporation in trust and a receiver is appointed over the corporate property the trust property remains impressed with the trust relationship and on petition of the claimant will be turned over to him by order of court. The conversion and misapplication by the corporation does not alter the rights of parties if the property or its proceeds can be traced.¹

the further construction, equipment and final completion of the road and to issue certificates therefor and that such certificates "whether for money borrowed, material furnished, labor performed or on account of contracts made by him on account of the construction of the road" should be treated as a receiver's indebtedness and be a first lien on the road. It was held that the receiver could not issue certificates in payment of material until it had been furnished, and having done so for material contracted to be delivered, but which in fact never was, the certificates were void. The receiver must follow the directions of the order from which he receives his authority.

In *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 L. ed. 819, the receiver was authorized to "make all contracts that may be necessary in carrying on the business of said railroad, subject to the supervision of this court," but it was held he had no authority to make a lease of general offices for a term without authority from the court and to bind his successors and the property therefor for the term without direction from, or sanction by, the court, and the mere fact that the receivers' accounts showed monthly the payment of rent under such a lease and that that rent was reasonable, and that the accounts as rendered were passed by the master and reported to and approved by the

court did not amount to a sanction of the lease for the term.

¹ In *People v. Bank of Dansville*, 39 Hun, 187, it appeared that E & Co., were creditors of H and drew their sight draft on him payable to the order of the cashier of the bank of D and sent the same to the bank for collection with specific instructions to remit the proceeds. The draft was paid in full to the bank and the bank drew its own draft for the amount of the collection less charges on a New York bank payable to the order of E & Co., and forwarded the same to them. E & Co. forwarded the draft for collection and it was returned dishonored, the bank of D having in the meantime become insolvent and ceased to do business. In this case it was held that E & Co. were entitled to the amount of the draft so collected by the bank paid to it by the receiver in preference to the general creditors. In such case, the funds of the bank being *in custodia legis*, it was unnecessary for the petitioners to file a bill for the purpose of establishing their equity; a summary application by petition was all that was required.

In *Chase v. Petroleum Bank*, 66 Pa. 169, Chase, having balances in the bank, requested the bank to pay a debt for him, agreeing that the balances should be applied to the repayment. The bank paid the debt and Chase gave his note for the amount, the balances to be adjusted in a short

time. In the meantime the bank failed and went into the hands of a receiver and it was held that there had been an appropriation of the balances to the note and in a suit by the bank on the note the balances were to be deducted. Such balances were not subject to check and could not have been attached by Chase's creditors.

In *People v. Merchants' & M. Bank*, 78 N. Y. 269, the application of the petitioner was required to show and trace into the hands of the receiver the money which it was claimed was a trust fund. It did not appear that there was any actual setting apart or appropriation of any specific fund or property of the bank or of the drawer of the check for its payment and it did not appear that the identical funds deposited were in the possession of the bank when the check was presented for payment. In fact it was conceded they were not. The bank was simply a debtor of the depositor for the balance of the deposits which stood to its credit.

In *Re Hallett's Estate*, L. R. 18 Ch. Div. 696, it was held that money held by a person in a fiduciary capacity, though not as trustee, and paid by him to his account at his bank may be followed by the owner and the amount be made a charge on the balance in the hands of the bank; that if a person holds money as trustee or in a fiduciary character places it to his account in his bank and mixes it with his own money and afterwards checks out sums of money in the ordinary manner, the rule as to the first drawings out of the first payments does not apply to such case and the drawer must be taken to have drawn out his own money in preference to trust money.

In *Thuemmler v. Baruh*, 89 Wis. 381, a draft was sent to another bank

for collection of credit. The former bank's account with the latter bank was then overdrawn, but collaterals were held to secure it against overdrafts. The draft was collected by the bank and the proceeds credited to the bank making the remittance, and it then failed. It was held that the owner of the draft was not entitled to a preference of payment out of the assets of the remitting bank, the proceeds of the draft not being traceable into any of such assets.

In *Henry v. Martin*, 88 Wis. 367, it appeared that before the making of an assignment by an insolvent an agent deposited money of his principal therein in another than his own name, with notice to the bank that it belonged to third parties. It was held that the deposit not having been a special one and it not being claimed that any part of the money which came to the assignee was the identical money deposited, the assets of the bank are not impressed with any trust in favor of the principal so as to make him a preferred creditor. The deposit created the relation of debtor and creditor simply and the bank receiving the money was the debtor and not a bailee. Cf. *Nontuck Silk Co. v. Flanders*, 87 Wis. 237; *McLeod v. Evans*, 66 Wis. 401.

In *Carley v. Graves*, 85 Mich. 483, the facts stated were held not to constitute the relation of debtor and creditor, but that of trusteeship, and the funds were ordered to be turned over to the payee.

In *Importers' & T. Nat. Bank v. Peters*, 128 N. Y. 272, it appeared that money was held by a person in a fiduciary capacity and was deposited by him in his general account at the bank. It was held that the money could not be followed by the owner. If the owner pays it to his account with his bank and mixes it with his

§ 413. Effect of receiver's discharge pending action.

Where the receiver is discharged pending an action against him it is a bar to the further prosecution of the suit, and should be pleaded by the receiver as such bar; and it seems that the defense does not depend upon notice of the application for a discharge being served upon plaintiff.¹

§ 414. Order of discharge.

In the order of sale the court has power to protect the interests of all parties who have suits pending and undetermined at the time of the receiver's discharge, and may order a sufficient sum to be reserved from final distribution to pay the claims if established, or may direct the sale to be made subject to such claims and retain jurisdiction to compel the purchaser to satisfy them.²

own money and afterwards draws out some by checks generally, and in the ordinary manner, the drawer of the check must be taken to have drawn out his own in preference to the trust money.

¹ In *Brown v. Gay*, 76 Tex. 444, it is held that where, pending suit for injuries against a receiver, he is discharged, the suit as to him abates for want of proper parties. Where the receiver is discharged and the property all turned over to the company under the order of court this ends the control of the court over the property. The custody of the court went with the discharge of the receiver.

Texas P. R. Co. v. Johnson, 76 Tex. 421. In this case it is also held that when property is released from the custody of the court it stands subject to any claim or charge that may be raised upon it. A suit for personal injuries growing out of the negligent management of the receiver may be maintained against the railroad company after the property is restored to it, where the current earnings of the road were used by the receiver in improving it.

In *Bond v. State*, 68 Miss. 648, the discharge of the receiver was held to be a bar to an action by the state to recover a penalty for a failure to keep a bulletin board showing the time of arrival and departure of trains. In such case the discharge does not abate the suit, but it may be prosecuted against his successor.

² In *Schmid v. New York, L. E. & W. R. Co.* 32 Hun, 835, a similar doctrine is held, in which case the indebtedness of the receiver was declared to be a lien upon the premises sold prior to the mortgages. The court say: "Certainly the receiver's liability for killing plaintiff's intestate was a liability which could be enforced against the receiver and the property held by him. The plaintiff, therefore, has a legal right, founded upon some obligation of the promisee, and she has a right to adopt and claim the promise to have been made for her benefit. She is not a mere stranger." Cf. *Vrooman v. Turner*, 69 N. Y. 285.

In *Farmers' Loan & T. Co. v. Central R. Co.* 17 Fed. Rep. 758, it is held to be a proper exercise of chancery

§ 415. Conflicting claims; how determined.

Where a person claims a superior legal or equitable right to the receivership property in the possession of the receiver, the proper practice is for him to file a petition in original action setting up his rights and have them determined therein. An independent suit is not proper. A court of equity, as seen elsewhere, is not inclined to be drawn into a contest concerning purely legal titles, and may direct an issue to be tried by a jury, or common-law suit to be brought for such purpose.¹

power on surrendering the trust property to the purchaser to retain jurisdiction of the original case and the authority to enforce the payments of the debt and liabilities incurred by the receiver in the operation of the railway. There was a condition in this case in the order of confirmation that the purchaser should pay all debts of the receiver and all claims or liabilities pending in the foreclosure case.

In *Davis v. Duncan*, 19 Fed. Rep. 477, it is held that after an order discharging the receiver and directing him to turn over the property in his hands to the defendant corporation, which was done, the court could not, after the adjournment of the term at which the order was made and entered of record, change, modify, or expand the decree discharging the receiver and again obtain jurisdiction over the property and funds which it had, by its decree, turned over. If, however, the decree had provided that it should be subject to the satisfaction of all claims arising while the property was under the receiver's control, the court as a court of equity, had a right to provide for the payment of such claims and retain jurisdiction of the cause to that extent.

In *Brown v. Wabash R. Co.* 96 Ill. 297, the deed of sale provided "that said estate and interest are hereby charged with and shall pass by virtue

of these presents, subject to the payment of all liabilities incurred in respect to the said railroad or its business by the said receiver." It was held that the grantee held the property subject to the payment of such liabilities as the receiver had incurred while he had possession and control of the road. Where personal injury is suffered by reason of the negligent management of the road by the receiver, the party injured, or his representative, must first sue at law and settle the receiver's liability and the amount of damages, and then file a bill in equity against the grantee company.

In *Sloan v. Central Iowa R. Co.* 63 Iowa, 728, a railroad was operated for a time by a receiver and while in such management a person suffered personal injuries and subsequently the court ordered the railway to be turned over to the defendant, upon the condition that it would assume and pay all liabilities of the receivership. The company accepted the property with the conditions attached and was held liable to the plaintiff for damage. In this case the action was brought against the railroad company. Under such circumstances the company cannot retain the property and repudiate the conditions under which it is received.

¹In *Van Rensselaer v. Emery*, 9

§ 416. Receiver's accounts.

The court appointing a receiver has power to require him to state his accounts whenever, and to such person, master, or referee, as to the court shall seem proper. Such account should be full, complete, and definite and under oath, and be accompanied by vouchers for all expenditures made.¹

How. Pr. 185, where a receiver had been appointed in supplementary proceedings to enforce payment of a judgment against partnership property it is held that he ought not to be made a party to an action and an injunction restraining him in the discharge of his official trust, but the proper practice in such case is, where it is desired to restrain the receiver, to apply to the court for instructions.

In *Porter v. Kingman*, 126 Mass. 141, it is held that the purchaser of an estate subject to a mortgage given by a former owner to a bank cannot maintain a bill in equity against the receivers of the bank for a cancellation of the mortgage on the ground that it was obtained by false and fraudulent representations of the bank, but the remedy in such case is for the purchaser to proceed by a petition in the cause in which the receivers were appointed. Equitable rights which are contended as superior to the title of the receiver cannot be set up in an independent suit. *Re Day*, 84 Wis. 638; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160.

¹ In *Hayden v. Chicago Title & T. Co.* 55 Ill. App. 241, the same doctrine is affirmed by the court. Where the accounts are not assented to, the general rule requires that they should be referred to a master. *Cowdrey v. Galveston, H. & H. R. Co.* 1 Woods, 381; *Huling v. Farwell*, 33 Ill. App. 238.

Without a reference, notice to the parties interested to attend before the master must be given. *Acme Copying*

Co. v. McLure, 41 Ill. App. 397; *Strang v. Allen*, 44 Ill. 428.

In *Heffron v. Rice*, 40 Ill. App. 244, affirmed in 149 Ill. 216, the court holds that where accounts are presented under decrees in equity a party must swear peremptorily that he has paid the money in question, a voucher must be filed with the account, if possible, and where there are no vouchers a positive verified statement should be filed showing to whom, for what, and when such items were paid. The burden of proving improper conduct upon the part of the receiver is upon the party alleging the same, and if he does not support his charges they must be dismissed at his cost. On a reference before the master the receiver may be required to show fully how he kept his funds. *Hinckley v. Gilman, C. & S. R. Co.* 100 U. S. 153, 25 L. ed. 591.

In England the master's report upon a receiver's account did not require confirmation by the court, and was not subject to exceptions. The court would, upon petition of any person aggrieved, review the general principles of law on which the master had proceeded in taking the receiver's accounts, and which were alleged to be erroneous, but the court would not review questions of fact as to the correctness or particular items in the accounts, and this seems to be the rule adopted in New York and United States courts. *Brower v. Brower*, 2 Edw. Ch. 621; *Cowdrey v. Galveston, H. & H. R. Co.* 1 Woods, 341.

§ 417. Appeal by receiver.

The receiver's right to appeal in all matters relating to his official conduct, his accounts and orders of court relating thereto, is well established. In such case he, in effect, occupies the position of a party to a suit.¹

§ 418. Deed by receiver.

The receiver's power to execute a deed conveying property

The practice in Illinois, New Jersey, Rhode Island, Alabama, Indiana, Oregon, and other states conforms to the Irish chancery practice by which the courts will investigate the items of the receiver's accounts. *Woolsey v. Cummings Car Works*, 83 N. J. Eq. 482; *Special Bank Comrs. v. Franklin Inst. for Sav.* 11 R. I. 557; *Ryon v. Thomas*, 104 Ind. 59; *McGee v. Conperthwaite*, 10 Ala. 986; *Hooper v. Winston*, 24 Ill. 353; *Martin v. Martin*, 14 Or. 165.

The case of *Heffron v. Rice*, 40 Ill. App. 244, was affirmed in the supreme court in 149 Ill. 216, where it was held that if the receiver's account consists of money items of payments for some of which he took no receipts, but books were kept in which all payments were entered, and the payments were such as were incident to the business he was engaged in, and the proof showed that such items were correctly copied from the books kept by the receiver and his assistants and the entries in the books were correct, the court will be justified in approving the account. It is also held that it is the duty of the receiver to make out and file with the court in which he is appointed an inventory of the property which passes through his hands so that all creditors and other persons interested may know what is receivership property.

In *People v. Columbia Car Spring Co.* 12 Hun, 585, it is held that be-

fore a referee is appointed to pass upon the accounts of a receiver, the receiver should present to and file with the court a full and definite account, verified by his oath, itemizing with particularity the various claims made by him, and the reference should relate specifically to the claims therein made. This is necessary that the parties affected by the claims of the receiver may have an opportunity to determine whether they are willing to consent to the same without reference, and also to enable the court to see more clearly the nature and extent of the claim.

¹ In *How v. Jones*, 60 Iowa, 70, it is held that a receiver who is the mere custodian cannot appeal from an order directing him to turn over the property in his hands. But if the order erroneously fixes the amount of the property he is entitled to appeal.

In *Re Guardian Sav. Inst.* 78 N. Y. 406, the surety for a receiver in a matter involving his accounts was held to be entitled to an appeal.

In *Akers v. Veal*, 66 Ga. 302, the receiver was held not to be entitled to a jury as passing upon his accounts, but on objections filed by creditors the proper practice is to refer the matter to an auditor, and the receiver, if not satisfied with the finding of fact, may file exceptions to the auditor's report and may demand a jury to pass upon such exceptions.

sold by him under the order of court is implied from the direct power given, but his power to do so is not to be exercised until the sale is reported to the court and has been confirmed.¹

¹ In *Simmons v. Wood*, 45 How. Pr. 262, it is held that no transfer of the interest could be made by the receiver until his report was made and an order of confirmation granted on notice to the parties who had appeared in the action. Any transfers before such confirmation would be unauthorized, and any payment by the purchaser before such time would be at the risk of the purchaser.

In *Koonle v. Northern Bank*, 88 U. S. 16 Wall. 196, 21 L. ed. 465, it is held

that it is sufficient if the purchaser from a receiver see that there is a suit in equity in which the receiver was appointed; that he was authorized to sell the property; that a sale was made under such authority and confirmed by the court; and that the deed accurately describes the property or interest sold. The authority conferred by the court to the receiver carried with it authority to give to the purchaser evidence of a transfer of title.

CHAPTER XXIII.

FORMS.

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| No. | 1. | Complaint for dissolution of copartnership. |
| | 2. | “ against insolvent corporation. |
| | 3. | “ allegation—Copartnership. |
| | 4. | “ “ —Foreclosure proceedings. |
| | 5. | “ against corporation for fraud and accounting. |
| | 6. | Affidavit for appointment in foreclosure. |
| | 7. | “ for appointment, general. |
| | 8. | Notice “ “ “ |
| | 9. | Order appointing receiver general. |
| | 10. | “ “ “ —Manufacturing corporation. |
| | 11. | “ “ “ —Railroad foreclosure. |
| | 12. | “ “ “ “ “ Short form. |
| | 13. | “ “ “ “ “ Trustees. |
| | 14. | “ “ “ —Partnership. |
| | 15. | “ “ “ —Joint business. |
| | 16. | “ “ “ to manage mine. |
| | 17. | “ “ “ because of misconduct of corporate officers. |
| | 18. | “ “ “ of specific personal property. |
| | 19. | “ “ “ without prejudice to encumbrancers. |
| | 20. | “ “ “ of rents and profits. |
| | 21. | “ to show cause why not appointed. |
| | 22. | Bond of receiver. |
| | 23. | “ “ “ Another form. |
| | 24. | “ “ “ Short form. |
| | 25. | Assignment to receiver. |
| | 26. | Notice by receiver to creditors and debtors of appointment. |
| | 27. | Order on creditors to exhibit claims. |
| | 28. | “ appointing special commissioner to report claims. |
| | 29. | “ “ commissioner or referee to report claims. |
| | 30. | “ to pay claims accruing prior to appointment. |
| | 31. | “ requiring defendant to turn over books, etc. |
| | 32. | Petition by receiver to compel delivery of assets. |
| | 33. | Affidavit for motion to compel tenants to pay. |
| | 34. | “ for order to stay actions. |
| | 35. | Petition by receiver for leave to defend. |
| | 36. | “ by “ “ “ to settle traffic balances. |
| | 37. | Order to “ “ to settle traffic balances. |
| | 38. | “ “ pay rent. |
| | 39. | Petition by receiver for leave to sell. |
| | 40. | Order to “ “ to sell |
| | 41. | “ for sale of perishable property. |
| | 42. | “ confirming sale. |

43. Petition for order on purchaser to complete purchase.
44. Order " " " " " "
45. Petition for leave to employ counsel.
46. Order granting " " " "
47. Petition for leave to pay claims.
48. Notice for instructions to receiver.
49. Petition " " " " to pay.
50. " " " " " " surrender, etc.
51. Notice of petition for leave to distribute.
52. Petition of receiver for leave to account and be discharged.
53. Receiver's account.
54. " " —Objections to.
55. Notice of motion for revocation of appointment.
56. Order discharging receiver.
57. " removing and appointing substitute.
58. Notice of motion to discharge.
59. Order to show cause why should not be discharged.
60. Notice of motion for discharge.
61. Order on receiver to pay over funds to successor.
62. Affidavit to show cause in contempt proceedings.
63. " " continue actions against receiver.
64. Petition of receiver to be substituted in action.
65. Order on sheriff to withdraw levy.
66. Order to receiver to sue.
67. Complaint on receiver's bond by creditor.
68. Declaration on assessment—National bank.
69. " " promissory note— " "
70. Petition of receiver of national bank to compromise.
71. Order on " " " " " " "

The following forms for use in receivership cases are inserted in response to what has seemed to be a general demand of the bar and particularly the young and inexperienced practitioner, to whom they will probably be found of most use. It will be needless to say, however, as may be said of all forms, that they are of necessity general, and not to be followed implicitly in any case, but used merely as guides or suggestions. They must be made to conform, not only to the usage and practice of each particular state, but to the facts and circumstances of each particular case or class of cases.

A number of the forms herein are taken by permission of the publishers, Messrs. Anderson & Co., from Loveland's Forms of Federal Procedure and Thornton's Indiana Practice, Volume II. The latter is particularly adapted to the code practice in Indiana and other code states.

We also append hereto for reference a list of works containing approved forms in receivership matters for use in New York and other states, valuable to those having access thereto.

APPROVED WORKS ON FORMS.

Abbott's Principles and Forms of Practice, vol. II., p. 141 *et seq.* (New York).

Barbour's Chancery Practice.

Curtis's Equity Precedents, p. 442 *et seq.*

Daniell's Chancery Forms, pp. 884-907.

Lansing's Forms of Civil Procedure.

Loveland's Forms of Federal Procedure, p. 223 *et seq.*

Legga's Forms & Precedents. Canadian.

Seton's Forms of Judgments, chap. 32. English.

Thornton's Indiana Practice, vol. II., p. 1384 *et seq.*

Wilcox's Forms.

Wild's Journal of Entries. Ohio.

No. 1.

COMPLAINT FOR THE DISSOLUTION OF A PARTNERSHIP AND FOR A RECEIVER.¹

(CAPTION.)

(*Commencement.*) That on or about the — day of —, 189—, plaintiff and defendant, by a contract of copartnership of that date, duly entered into, agreed to become partners for the purpose of carrying on a — business in the city of — for a period of — years from the date thereof, under the name and style of —, and to be equally interested in the profits and equally liable for the losses of said partnership; and the plaintiff files herewith, as part hereof, a copy of their said contract of copartnership, marked "Exhibit A."

That by said contract, it was, among other things, agreed that, should either of the partners use the partnership property except for the purposes of the partnership, or wilfully neglect or refuse to keep just and proper accounts of its business, the other or others of the partners should be at liberty at once to dissolve said partnership, by giving to the partner or partners so offending a

¹ See *ante*, chap. XV.

notice in writing, declaring said partnership to be dissolved and determined. (*If not part of express contract but of implied contract, so state.*)

That under and by virtue of the said contract the plaintiff and the said defendant, as partners, have carried on the said business in the said city of — for the period of — years.

That the said defendant has excluded the plaintiff from all share in and control over the partnership affairs, and absolutely refused to permit him to inspect the books of account of the partnership, and is now engaged in sending parcels of partnership goods to be auctioned, where they have been sold, and are now selling, at a great sacrifice; and are collecting debts due to said firm, and in many cases where those debts are not yet due and payable, have compounded with the debtors by allowing them very great discounts for prompt payment thereof. (*Here set forth as particularly any other grounds of violation of the partnership contract or partnership duty, and conclude:*)

Wherefore the plaintiff prays that a receiver may be appointed to take charge of all the partnership books and papers, accounts, goods and effects, and to collect the debts due thereto, and to preserve or dispose of the same under the direction of this court. (*Add usual and necessary prayer as in other cases, post, Form No. 3, and for injunction, if desired.*)

No. 2.

COMPLAINT AGAINST INSOLVENT CORPORATION.¹

(Adapted to Code practice.)

(CAPTION.)

Plaintiff complains of the defendant and alleges:

That the defendant, the — Company, is, and for more than — before the recovery of the judgment hereinafter mentioned was, a corporation duly organized and existing under the laws of this state, and its general business is transacted and its principal office is, and was at the time of the commencement of this action, located in the city of —, county of —, and state of —.

That on the — day of —, 189—, this plaintiff recovered a judgment against the defendant in the — court of this state for the sum of — dollars and — cents, and costs of suit.

¹The statutory requirements for proceedings of this nature must be strictly followed. See *ante*, chap. XII.

See Thornton's Indiana Practice.

That an execution against the defendant was duly issued on said judgment to the sheriff of the county of —, on the — day of — 189—, and that said execution has been returned wholly unsatisfied.

That the said judgment and the claim therefor remain wholly unpaid.

That the said defendant is, as the plaintiff is informed and believes, insolvent, and owes a large amount of indebtedness and claims which it is unable to pay. (*State the facts constituting insolvency.*)

Wherefore plaintiff demands judgment:

That the property of the defendant corporation be sequestered and distributed.

That the proceeds thereof be justly and fairly distributed among the creditors of the defendant, including the plaintiff, in the order and in the proportions prescribed by law in the case of a voluntary dissolution of a corporation.

That a receiver of the property and effects of the defendant corporation may be appointed, pursuant to law, with the usual powers and authority conferred upon receivers in such cases.

And that the plaintiff have such other and further relief in the premises as may be just.

No. 3.

ALLEGATION OF BILL OR COMPLAINT FOR RECEIVER OF PARTNERSHIP PROPERTY.

That in pursuance of said partnership agreement they purchased a stock of — of the value of — dollars, established and opened a — store in said city, and have maintained the same hitherto.

That plaintiff and defendant no longer desire to maintain said copartnership, and have dissolved the same, but are unable to agree upon a division of the stock of goods, wares and merchandise now on hand.

(*Or*), that the defendant, not regarding his duties as a member of said partnership, has converted to his own personal use and benefit a large amount of the partnership accounts, to wit, — dollars, and has refused and still refuses to account for the same, although the plaintiff has requested him so to do.

(*Or, here set forth any other ground for which a receiver may be appointed as shown in chap. XI. and conclude:*)

Wherefore plaintiff prays that a receiver may be appointed to take charge of and sell said stock of goods, wares and merchandise (and a decree dissolving said partnership).

If it is desired to have the receiver continue the business as a going concern it is well to embody it in the prayer and also show, in partnership cases, the necessity for so doing.

No. 4.

ALLEGATIONS OF BILL OR COMPLAINT IN FORECLOSURE PROCEEDINGS.¹

That the mortgaged premises, upon a sale thereof at public auction, cannot bring sufficient to satisfy the debt due the plaintiff with interest, costs, premiums of insurance, and arrears of taxes, as more fully appears by the affidavits of — annexed.

(Or, that said above-described premises are an inadequate security for the payment of the said mortgage indebtedness, interest, costs and advancements and that said inadequacy exists by reason of waste committed by said mortgagor (or grantee) in this (—); or by reason of destruction or injury of the buildings on said premises by fire; or depreciation in the market and rental value of said premises.)

That said premises at the commencement of this action were, and ever since have been, in the possession of the defendant (—), above named, under the conveyance above stated, and that all persons in possession of said premises, as tenants or otherwise, at the time when this action was commenced, are defendants herein.

That the said —, who is now primarily liable for the debt secured by mortgage, as well as the defendant —, the mortgagor and obligor in said bond, are both pecuniarily irresponsible and unable to pay the probable deficiency on the sale of the mortgaged premises, as appears by the affidavit of — annexed.

(Or, that said — mortgagor and — are each insolvent and unable to pay any deficiency that may be rendered against them; that judgments have been rendered against them, and executions have been issued thereon and returned unsatisfied in whole or in part and still remain unsatisfied; or that they own no real or personal property liable to execution; or any other fact showing insolvency or inability to pay a deficiency judgment.)

That the said premises are occupied for the purpose of —, and that the entire rentals and income therefrom, as your petitioner is informed and believes, amount to the sum of — dollars annually and no more.

¹See *ante*, chap. X.

No. 5.

COMPLAINT BY CREDITOR AGAINST CORPORATION FOR AN ACCOUNT, AND TO SET ASIDE A FRAUDULENT JUDGMENT, AND FOR A RECEIVER.

(Adapted to Code practice.)

(CAPTION.)

(Commencement.) That the (*name of corporation*) is a corporation duly organized under the general laws of the state of —, for the purpose of carrying on the business of — in said state.

That at the —, 189—, term of the — court of the state of —, the plaintiff recovered a judgment against said corporation for the sum of \$—, which judgment still remains in full force and unpaid.

That on the — day of —, 189—, an execution was duly issued out of said court against said defendant, and delivered to the sheriff of — county, of the state of —, commanding him to levy the same upon the goods and chattels of said corporation and for want thereof upon the lands and tenements of the same, which execution on the — day of —, 189—, was returned wholly unsatisfied. (*Vary to suit form of execution in state where used.*)

That the defendants are directors of said corporation, and on the — day of —, 189—, suffered judgment to be recovered against said corporation for \$— in favor of (*Allege particularly the judgment and the facts which are claimed in rendering it fraudulent. Or state any other ground which is a sufficient basis for the action.*)

That said corporation is insolvent, and entirely unable to pay its debts (*or other statutory grounds*).

That there is now due from the defendant to the plaintiff on his said judgment the sum of \$—, with interest from the — day of —, 189—.

Plaintiff therefore prays and asks that said directors be required to account for the funds and property of said corporation committed to their charge, and for all corporate property acquired by themselves or lost by a violation or neglect of their duty as directors, and that they be required to pay all sums of money found due from them; that a receiver may be appointed to take charge of the property and effects of said corporation, and that said defendants may be enjoined from transferring any of the property or effects of said corporation until the further order of this court; and that upon the final hearing the said judgment be set aside.

and the property sold, and the proceeds thereof applied to the payment of the plaintiff's judgment; and for such other and further relief as justice and equity may require.

No. 6.

AFFIDAVIT FOR APPOINTMENT OF RECEIVER IN FORECLOSURE PROCEEDINGS.¹

(TITLE OF COURT AND ACTION.)

_____, being duly sworn on oath, says:
That he is the (plaintiff) in the above-entitled action; that this action is brought for the foreclosure of a mortgage executed by the defendant _____ to secure the payment of the sum of _____ dollars with interest, dated the _____ day of _____ and duly recorded on the _____ day of _____, in the office of the Recorder of Deeds of said _____ county upon the premises therein described as follows, to wit: said indebtedness being evidenced by a promissory note with interest at the rate of _____; that there is now due and unpaid upon said note and mortgage now owned by the said plaintiff the sum of _____ dollars principal, and _____ dollars interest thereon; that the plaintiff, in order to preserve the lien of his mortgage and under the terms and conditions thereof, has advanced the sum of _____ dollars as premiums for insurance upon the buildings on said premises; that the defendants have failed to pay the taxes assessed on the said premises for the year of _____, amounting to the sum of _____ dollars and that the plaintiff has paid the said taxes pursuant to the terms and conditions of said mortgage; that the said mortgaged premises are an inadequate security for the payment of the amount due upon said mortgage, principal and interest, and the advancements made by plaintiff for insurance and taxes as above stated; that such inadequacy is caused by *(State whatever the grounds of inadequacy are, such as waste, decrease of market and rental value, or otherwise)* that the said mortgagor *(and other persons liable for the payment of the mortgage debt)* is insolvent, having no property liable to execution (that judgments have been rendered against said mortgagor and executions returned thereon no property found) that said premises, at the time of the commencement of these proceedings, were and are now in the possession of _____, defendant herein, who claims to own the same as purchaser thereof from the said mortgagor under a deed of conveyance thereof bearing date the _____ day of _____, but which conveyance is subject to the mortgage sought to

¹See *ante*, chap. X.

be foreclosed herein; that the rental value of said premises will not exceed the sum of — dollars per annum. (*If the mortgage contains a grant of the rents and profits of the mortgaged premises state the same fully and particularly, and if there is a clause therein providing for the appointment of a receiver, set out such clause in the words of the mortgage and the defaults upon which the appointment by the terms of the mortgage is to be based.*)

No. 7.

AFFIDAVIT FOR APPOINTMENT OF RECEIVER IN
A JUDGMENT CREDITOR'S ACTION TO SEQUESTRATE CORPORATE PROPERTY.¹

(Adapted to Code practice.)

(CAPTION.)

_____, being duly sworn, says:
That he is the plaintiff's attorney herein.

(*State grounds, as thus:*) That judgments have been entered against the defendant in various actions brought against it in this and other courts; that in some of said actions executions have been issued; that other suits are pending on simple contract debts and on claims for damages to a large amount, and also an action for the foreclosure of a mortgage made by the defendant to the _____ Company in trust.

That the defendant is insolvent and unable to pay its debts, and that if a receiver is not appointed at a very early date there is danger that some of the creditors of the defendant may obtain an undue preference.

That for these reasons an order to show cause is desired and that no previous application has been made for such an order.

No. 8.

NOTICE OF APPLICATION FOR THE APPOINTMENT
OF A RECEIVER.²

(CAPTION.)

To _____:

The defendant in the above-entitled cause is hereby notified that on the _____ day of _____, 189—, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, the plaintiff

¹See *ante*, chap. IX.

²See *ante*, chap. I.; also § 874.

will, at the court-house (or the judge's chambers) in the city of —, in said county, make application to the Honorable — (one of the judges, or the judge of the — Court), for the appointment of a receiver in said cause, to take charge of and sell the property in controversy. (*Or state for what purpose a receiver is to be asked.*)

(*If the application is based on bill or petition filed, so state; if upon affidavits, serve copies of same if the practice or rules of court so require. If the notice is to refer the cause to a master in chancery or referee to hear the application, take evidence, and report his conclusions. Vary notice to correspond.*)

Dated this —, 189—.

—, —,
Attorney for Plff.

I hereby acknowledge service of the above notice this — day of —, 189—.

— —.

No. 9.

ORDER APPOINTING RECEIVER.¹ (GENERAL FORM.)

(TITLE.)

Come now the parties, and upon reading and filing the affidavit of —, verified the — day of —, 189— (*or, after hearing the evidence of said parties*), whereby it satisfactorily appears to the court that (*briefly indicating the facts established*) and on reading and filing proof of due notice to the defendant, —, of this motion, and after hearing argument of counsel for plaintiff, and —, of counsel (*or, and no one appearing*) for the defendant in opposition, and the court being fully advised in the premises, now, on motion of —, attorney for plaintiff, which motion the court now finds should be sustained:

It is ordered and decreed that — be, and hereby is, appointed receiver of (*clearly designating the property*) with the usual powers pending this action (*or specify powers*).

That before entering upon the duties of his trust the said receiver execute to —, and file with the clerk of this court, a bond with — sufficient sureties to be approved by this court (*or the clerk if the statute permits or the court so directs*) for the faithful discharge of his duties as receiver, and take an oath to faithfully perform his duties as such receiver.

¹See *ante*, chap. II., § 22; also § 381.

No. 10.

ORDER APPOINTING RECEIVER FOR A MANUFACTURING CORPORATION.¹

(CAPTION.)

Upon reading and filing the verified bill of complaint in this cause, together with the verified affidavits of — and —, and the exhibits in support thereof, and on motion of the counsel for plaintiff and counsel for defendant appearing and consenting thereto, it is ordered by the court that —, of —, in the state of —, and —, of —, in the state of —, be and they are hereby appointed receivers of this court of all and singular the property of the — Company of every description, and all money, claims in actions, credits, bonds, stocks, leasehold interests or operating contracts, and other assets of every kind, and all other property, real, personal or mixed, held or possessed by said company, to have and to hold the same as officers of and under the orders and directions of this court.

The said receivers are hereby authorized and directed to take immediate possession of all and singular the property above described, and to continue the business of said company, until the further order of court.

Each and every of the officers, directors, agents, and employees of said — Company are hereby required and commanded forthwith, upon demand of the said receivers, to turn over and deliver to such receivers any books, papers, moneys, deeds, property, or vouchers for the property, under their control.

The said — Company and its officers are hereby directed immediately to execute and deliver to the said receivers deeds of all real estate now owned or possessed by said company, and transfers and assignments of all their property.

Said receivers are hereby fully authorized to institute and prosecute all such suits as they may deem necessary, and to defend all such actions instituted against them as such receivers, and also to appear in and conduct the prosecution or defense of any suits against the — Company.

The said receivers are hereby authorized and directed out of the moneys coming into their hands to pay and discharge all amounts due to employees upon the current pay-roll.

Each of said receivers is required to file with the clerk of the court within ten days from date a proper bond with sureties to be approved by the clerk of this court, in the penal sum of — dollars.

¹ See *ante*, chap. II., § 22; also § 381.

All creditors of said — Company are hereby enjoined from in any way intermeddling with the property hereby directed to be turned over to said receivers; and all officers, directors, and agents of said — Company are hereby enjoined from interfering with or disposing of said property of said — Company in any way, except to transfer, convey, and turn over the same to said receivers.

— — —, Judge.

No. 11.

ORDER FOR APPOINTMENT OF RECEIVER IN RAIL-
ROAD FORECLOSURE WITH FULL GENERAL
POWERS.¹

(TITLE.)

(*Recite hearing of court and findings.*) It is ordered and decreed that — be and he is hereby appointed receiver of all and singular the property and franchises of the said defendant mentioned and described in the complaint in this action, and all and singular the appurtenances in any wise thereto appertaining, and of all record books, papers and accounts of the said company in any wise appertaining to the business thereof, and necessary to enable him to properly and efficiently perform the duties imposed upon him by this order.

That he give a bond for the faithful performance of his duties as receiver in the premises in the sum of — dollars, with sureties (jointly and severally bound), to be approved (as to form and sufficiency) by this court, and that on the filing of such bond he enter forthwith upon the performance of his duties as such receiver.

And it is further ordered and decreed that as soon as may be after he shall have entered upon the performance of his duties the said receiver shall make and file with the clerk of this court a true, full and complete inventory of all and singular the property of the said company, real, personal and mixed, of all which he is appointed receiver.

The said receiver shall continue the operation of the said road in the ordinary and usual course as the same is now operated in the common carriage of freight and passengers, having due regard to the public interest and the accommodation of the public, and keeping the premises and property, both real and personal, in

¹ See *ante*, chap. II., § 22; also, chap. XIV.; also, chap. XXII., § 381.

good condition and repair, to the end that the said road may be efficiently operated with safety and convenience to the public. To the same end he shall, from time to time, employ and discharge all needful laborers, servants and agents, and purchase and pay for all such needful material and supplies as may seem to him necessary and proper in the exercise of a sound discretion, with leave to apply to the court from time to time as he may be advised for directions in the premises. He shall settle and adjust, according to usage and the usual course of business, all outstanding traffic balances with other railroads, and like balances from time to time as may arise. And he shall have power to make all usual, necessary and proper arrangements for the interchange of business in the way of traffic arrangements. And he shall have power generally to do and perform all things usual and proper according to the rules and usages of good railroad management, to increase the business of said railroad, and promote the convenience of the public.

He shall have power to prosecute and defend, without the further order of this court, all existing actions by or against said company, and to pay and defray the usual and ordinary expenses incident thereto. He shall have power to commence and prosecute any actions which in the usual course of business he may deem it proper and necessary to commence thereafter, either in the name of the said company or in his own name as such receiver, as he may be advised. He shall have full power to defend any and all suits that may hereafter be brought against the said company or against himself as such receiver (by the permission of this court), and to defray the necessary and proper expense of such prosecution and defenses. He shall do whatever may be needful to maintain and preserve the corporate organization and franchises of the said company till final judgment in this action, and to defray the necessary and proper expenses incident thereto, and in all and singular the premises he shall be subject to such orders and directions as this court may from time to time make, and he is authorized to apply from time to time for such orders and directions as he may be advised.

As soon as may be reasonably done, after he shall have entered upon the performance of his duties, the said receiver shall pay and discharge all debts due from said company to laborers, servants, agents and employees of all kinds for services rendered in and about the operation of the railroads of the said company, and in and about the conduct and management of its lawful business. Such payments shall not embrace debts due more than four months prior to the entry of this order without the further order of this court in the premises.

He shall in like manner ascertain the amount due by the said company, and unpaid, for current materials and supplies pur-

chased for the use and operation of the railroads of the said company within — months prior to the entry of this order, and he shall pay the amount found to be justly due, but he shall not have power to pay such debts of longer standing without the further order of this court.

He shall have power to redeem any and all securities of the company, now pledged as security for loans of money, and if needful shall have power to borrow money for this purpose, and he shall also have power to borrow money if needful, in his judgment, in order to comply with the directions contained in this order, and so far as may be needful to pay for current necessities for labor, and for no other purpose without the order of this court.

The receiver shall keep a full, true and particular account of all his acts and doings as such, of all the property, rents, revenues, and incomes, and of all his payments and disbursements in the performance of the duties imposed by this order. And he shall once in every three months, and oftener if required, render to this court, and file with the clerk thereof, a true, full and particular account of all his receipts and disbursements in the premises. He shall keep all balances of moneys in his hands on deposit in some bank of approved credit subject to his order, and he shall not pay out, but safely keep subject to the further order of this court, all such moneys, except in so far as payment and disbursements are authorized by the terms of this order. The premises considered, it is further ordered that the said defendant, the — Company, be and the said company is hereby commanded and strictly enjoined not to pay, or cause or permit to be paid, any interest upon any of the mortgage bonds of the said company until the further order of this court in the premises.

And the said company, and each and all of the officers and agents thereof, are also strictly commanded and enjoined to deliver up and render to the said receiver, when he shall have become qualified according to the terms of this order to enter upon his duties as receiver, all and singular the premises whereof he is thereby appointed receiver; and it is further ordered that each of the said defendant trustees respectively of the mortgages referred to in this action be, and they hereby are, severally and respectively restrained and enjoined from commencing or prosecuting, or causing or permitting to be commenced or prosecuted, any action against the said company, or in any wise affecting the property thereof, and from in any wise interfering with the said company or the property thereof as such trustees without the further order of this court.

SHORT FORM OF
ORDER APPOINTING RECEIVER FOR A RAILWAY.²

(CAPTION.)

Upon reading and considering the verified bill in this cause, together with the evidence adduced, on motion of counsel for the plaintiff, the defendant having been duly notified to appear by its counsel, it is ordered by the court that — be and is hereby appointed receiver of this court of all and singular the property, assets, rights, and franchises of the — Railway Company described in the bill of complaint herein, wherever situated, including all the railroad tracks, terminal facilities, real estate, warehouses, offices, stations, and all other buildings and property of every kind owned, held, possessed, or controlled by said company, together with all other property in connection therewith, and all moneys, choses in action, credits, bonds, stocks, leasehold interests, operating contracts, and other assets of every kind, and all other property, real, personal, and mixed, held or possessed by it, to have and to hold the same as the officer of and under the orders and directions of the court.

The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situate or found, and to continue the operation of the railroad of the said company, and to conduct systematically, in the same manner as at present, the business and occupation of carrying passengers and freight, and the discharge of all duties obligatory on said company.

And said — Railroad Company, and each and every of its officers, directors, agents and employees are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all books of accounts, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, money or other property in his or their hands or under his or their control, and they are hereby commanded and required to obey and conform to such orders as may be given them from time to time by said receiver, or his duly constituted representative, in conducting the said railway and business, and in discharging his duty as said receiver. And they and each of them are hereby enjoined from interfering in any way whatever with the possession or management of any part of the business or property

² See *ante*, chap. II., § 22; chap. XIV.; chap. XXII., § 381.
Foster's Federal Practice.

over which said receiver is so appointed, or from in any way preventing or seeking to prevent the discharge of his duties as such receiver. Said receiver is hereby fully authorized to continue the business and operate the railway of said company, and manage all its property at his discretion in such manner as will, in his judgment, produce the most satisfactory results consistent with the discharge of the public duties imposed on said company, and to collect and receive all income therefrom and all debts due said company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, counsel, managers, agents and employees as may be required for the proper discharge of the duties of his trust.

And said receiver is directed to deposit the moneys coming into his hands in some bank or banks in the city of —, —, and to report his selection to the court.

Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary, in his judgment, to the proper protection of the property and trust hereby vested in him, and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defense of any or all suits or proceedings now pending in any court against said company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights placed in his charge, and for the interest of the creditors and stockholders of said company said receiver is hereby required to give bond in the sum of one hundred thousand dollars (\$100,000) with security satisfactory to this court, for the faithful discharge of his duties, and is also required to make and file full reports in this court quarterly.

And the court reserves the right by orders hereinafter to be made, to direct and control the payment for all supplies, materials, and other claims, and to in all respects regulate and control the conduct of said receiver.

Judge.

And thereupon came in open court said —, and accepted such appointment, and was thereupon duly sworn according to law, and tendered his bond as required by said order, with — and — as sureties therein, which bond is hereby approved and accepted.

No. 13.

ORDER APPOINTING RECEIVER ON FORECLOSURE
BY THE TRUSTEES OF A CORPORATION MORT-
GAGE FOR THE BENEFIT OF BONDHOLDERS.¹

(TITLE.)

Upon reading and filing the verified complaint (or bill of complaint) herein, and the affidavit of —, verified —, 189—, and the affidavit of —, verified — 189—, and it appearing that by an order of this court entered herein on the — day of — 189—, — to show cause why a receiver of all the premises and property described in the complaint should not be appointed, with the usual powers of receivers in such cases, and with all the powers provided for in the indentures of mortgage set forth in the complaint, and why the plaintiff should not have other or further relief in the premises as may be just; together with due proof of the service of the summons in this action and said complaint, affidavit and order, to show cause, upon the said defendant.

And after hearing —, Esq., of counsel for the plaintiff, and —, Esq., on behalf of the defendant in opposition, and on motion of —, attorney for plaintiff, for a receiver herein, which motion the court now finds should be granted,

It is ordered and adjudged that — be appointed receiver of all the premises and property described in the complaint, (or bill) with the usual powers of receivers in such cases, and with all the powers provided for in the mortgage or deed of trust set forth in the complaint, the property described in said mortgage embracing all the property, both real and personal, and all the goods and chattels, franchises, privileges, rights and liberties to the — Company, in any wise appertaining or belonging, or which it may hereafter acquire or in any way become entitled to, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversions, remainders, rents, issues and profits thereof, and also the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said — Company, of, in and to the same, and any and every part thereof, with the appurtenances.

¹ See *ante*, chap. II., § 22; chap. XII.; chap. XXII., § 381.

No. 14.

ORDER APPOINTING RECEIVER OF PARTNERSHIP
ASSETS (SHORT FORM) BY CONSENT.¹

(TITLE.)

On reading the complaint and answer herein, and the notice of this motion, dated —, 189— (and the consent of —, dated —, 189—), and the affidavit of —, verified —, 189—, and after hearing —, Esq., attorney for the plaintiff, and the defendants appearing by (*names*), their attorneys, and consenting thereto, it is, on motion of —, attorney for the plaintiff:

Ordered and decreed that — is hereby appointed, with the usual powers and duties, receiver of the copartnership property, assets and effects of the firm of — (*or*, of the late firm of —), of —, and of the defendant —, as survivor of said firm, and that said receiver, after he shall have duly qualified, shall proceed forthwith to take possession of said copartnership property, and the parties hereto and each of them are hereby directed to deliver and transfer the same and all the partnership books, papers and effects to him; and he shall sell the same (subject to the order of the court) at public or private sale, as he shall deem most for the interest of the parties; and recover and collect and reduce to money the property, claims, demands, bills, accounts and all rights of action of said copartnership (*or*, said —, as survivor thereof), and shall retain such proceeds subject to the order of this court.

(*Where conveyance is necessary, direct it; for instance, thus:*) And, it further appearing that the title to the said —s, or some of them, or portions of them, stand in the name of the individual partners, of the said firm, it is ordered that the plaintiff and the defendants and each of them forthwith convey to the said receiver by good and sufficient bills of sale and conveyances, all —s or interests in —s, or any other property of the copartnership standing in their joint or individual names.

(*Directions as to carrying on business, if desired, may be thus:*) It is further ordered and decreed that the said receiver may complete the unfinished contracts of said copartnership if he, in his discretion, shall deem it advisable so to do.

(*Or*, That the said receiver shall not enter upon any new business, but shall put the unfinished stock of said partnership now on hand into marketable condition as speedily as possible.)

(*Or*, That the said receiver be, and he hereby is, authorized to carry on the said — business as heretofore carried on to such an extent only that he may (charter) the —s of said co-

¹ See *ante*, chap. II., § 22; chap. XI.; chap. XXII., § 381.

partnership to other persons or parties for hire until such time as the said —s can be sold to advantage, with full power and authority to the said receiver to sell the same upon such terms as he may deem proper and as shall be approved by this court.

(Bond clause, if security be required.)

(Where order is made in anticipation of dissolution, it may be directed) that said receiver shall not enter upon his duties until the — day of — next.

No. 15.

ORDER APPOINTING MANAGING RECEIVER OF A
JOINT BUSINESS.

(TITLE.)

(Recite trial and findings.) It is ordered and adjudged that the said — be, and he hereby is, appointed manager of the said business of —, and receiver of the property, assets, moneys and matters pertaining to the closing up of the said business, upon executing and filing a proper bond in the penal sum of — dollars, with leave to either party to move an increase, if any reason exist therefor at any time, conditioned for the due and faithful performance of the trusts reposed in him by this order, to be approved by this court, and that upon such execution, filing and approval the said — be, and he is hereby vested with the usual powers of managers and receivers in such cases, and with power to collect, sue for and recover the moneys and property that may pertain or belong to the closing up of the said business, including all funds in the hands of the defendant —, (as acting treasurer) of the said —, and all funds now in the hands of, or from time to time becoming due from, the plaintiff or the said —, under the said agreement, and which may be necessary for the payment of the expenses of such closing up, and of the losses and other debts and liabilities of the said —, or otherwise necessary to be paid from time to time in the closing up of the said business, and that as such manager and receiver the said — is authorized to carry on the said business by (collection of premiums, cancelation of policies), adjustment, payment and settlement of losses and otherwise, conformably with the orders and directions of this court. —, 189—, until the further order of this court.

And it is further ordered, that the said receiver, as soon as may be, shall make and file with the clerk of this court a proper inventory of all the property and assets now belonging or pertaining to the said —.

No. 16.

ORDER APPOINTING MANAGER OF A MINE.

(TITLE.)

(*Recite trial and findings.*) It is ordered and adjudged that — be, and he hereby is, appointed manager of all mining operations to be carried on in and by the use of the adit or tunnel mentioned in the pleadings in this cause, and of the use of the said adit or tunnel, and of the railroad therein, and of the use of the railroad connecting the mine with the public railroad, or used in connection therewith, and of the use of the ore dock, and the other implements, tools and property used in opening and working said mine by said (*names*), and said manager shall have power to control and manage the conduct of all persons who shall conduct or may be employed in said mining operations in conformity with the principles declared by the order made in this cause between (*names*), bearing date the —, 189—, and with the directions of this order.

And each of the parties having been given notice in writing, as specified in the above-mentioned order, that is to say, the said defendants — and — having served upon — and —, attorneys for — and also for the — Company, notice in writing that they intend at once to work and operate said mine to the full extent of its capacity, and the said — and the said — Company having served upon said — and — notices in writing that he and they are able and elect to furnish the said defendants with the — ores to which they are entitled by the terms of the contract mentioned in said pleadings, made by said — Company with said — and dated —, 189—, direction is hereby given to said manager that said plaintiffs shall forthwith be permitted to have the exclusive use and possession of said adit or tunnel, and the other tools, implements and property used in opening and working said mine, for the purpose of mining and making delivery to said defendants of such part of the minerals and ores as they are now entitled to under said contract, bearing date —, 189—; that such use and possession shall only continue for such period of time as in the judgment of the manager shall be reasonably necessary for the purpose of mining and making delivery of said minerals and ores; and after such period has expired, the use and possession of the parties of said adit or tunnel, and the other implements, tools and property used in opening and working said mine, shall be regulated and controlled by the said manager in conformity to the respective rights of the parties therein and thereto as defined and settled by the order of this court made —, 189—, in the cause wherein — was plaintiff and — were defendants.

And it is further ordered that either party have the liberty, on reasonable notice to the attorneys of the opposite party, to apply for further directions to said manager, and to apply for relief pending this suit, until the determination of the cause on final hearing. And it is further ordered that the compensation of such manager shall be paid by the parties equally while they jointly occupy the adit or tunnel, and in the case of exclusive occupation by either, then such party shall pay the whole.

No. 17.

ORDER GRANTING INJUNCTION AND APPOINTING RECEIVER OF PROPERTY BECAUSE OF MISCONDUCT OF OFFICERS.¹

(TITLE.)

Comes now the plaintiff by his attorney, and moves the court that a receiver be appointed herein, which motion is supported by the affidavit of —; and it appearing by the affidavit of —, verified the — day of —, 189—, that due notice of this motion was served upon the defendants — and —.

(*And if an injunction is sought, add:*) and it appearing (*reciting ground of injunction, and adding:*) and the plaintiff having given the (bond or undertaking) required by law in the sum of — dollars:

It is ordered and adjudged that —, of —, be, and hereby is, appointed receiver of (*specifying the particular property to be reached, or, if dissolution or distribution of all assets is sought:*) the defendant, the — Company, its stock, bonds, property, franchises, contracts, claims, demands, things in action and effects of every kind and nature, with the usual powers and duties according to law and the practice of this court.

That before entering upon the duties of his trust, said receiver execute to —, clerk of this court (*where by statute or practice it is proper to make the bond to the clerk*), and file with said clerk, a bond with at least — sufficient sureties, to be approved by this court, conditioned for the faithful discharge of his duties as receiver (*if dissolution or distribution of assets is sought add:* and for the due accounting for all moneys and property received by him).

(*For suspension of directors, when allowable, etc., add as follows:*)

That the defendants (*naming them*) be, and each of them is, hereby suspended from his office, and enjoined and restrained from doing or performing any act or thing as directors (*or trus-*

¹ See *ante*, chap. II., § 22; chap. XII.

tees), officers, agents or servants of the — Company, until the further order of this court in the premises.

No. 18.

ORDER FOR APPOINTING RECEIVER OF SPECIFIC PERSONAL PROPERTY.¹

(TITLE.)

(Recite hearing before the court and its finding.) It is ordered and declared that — be, and hereby is, appointed receiver of [the — bales of cotton now on board the ship — at *(describe the property, where located and in whose possession)*]; and said receiver is hereby authorized to expend a sufficient sum of money to insure the safe arrival of said (cotton) and is directed to sell such (cotton) when the same shall arrive in —, and to receive the money arising from the sale thereof, and to apply a sufficient part of such money in repaying what he shall expend in respect of such insurance as aforesaid, and in paying all necessary and proper expenses attending the receipt and sale of the said (cotton) (and to pay the surplus of such money into —, in trust in this cause).

No. 19.

ORDER APPOINTING RECEIVER WITHOUT PREJUDICE TO THE RIGHTS OF PRIOR ENCUMBRANCERS AND WITH OPTIONAL LEAVE TO KEEP DOWN CHARGES.²

(TITLE.)

(After recitation of finding and appointment, say:) But this appointment is to be without prejudice to the rights of any prior encumbrancers upon the said estates, who may think proper to take possession of the same by virtue of their respective securities, or, if any prior encumbrancer is in the possession, then without prejudice to such possession; and the tenants of the said freehold and leasehold estates are subject as aforesaid to attorn and pay their rents in arrears and growing rents to the said —, as such receiver, and such receiver is to be at liberty, if he shall think proper (but not otherwise), out of the rents and profits to be received by him, to keep down the interest upon the prior encumbrances according to their priorities, and is to be allowed such payments, if any, on passing his accounts.

¹ See *ante*, chap. II., § 22.² See *ante*, chap. II., note 22; chap. XII.

No. 20.

ORDER APPOINTING RECEIVER OF RENTS AND PROFITS IN FORECLOSURE OR OTHER ACTION AFFECTING REAL PROPERTY; WITH INJUNCTION AGAINST DEFENDANT.¹

(TITLE.)

[*Recite according to the case, and recite also the ground of the injunction; for instance, thus:* And it appearing that the mortgaged premises are an inadequate security for the mortgage debt, and that no one except the defendant — is personally liable for the debt, and that he is insolvent and that the defendants are about to collect the rents; (*and if the injunction is other than an order to stay waste or other damages, or to protect the receiver, add:*) and the plaintiff having given security as required by law.]

It is ordered and decreed that —, of —, be, and he hereby is, appointed, with the usual powers and directions, receiver (for the benefit of the plaintiff) of all the rents and profits now due and unpaid, or to become due pending this action, and issuing out of the (mortgaged) premises mentioned in the complaint and known and described as follows: (*description.*)

(*Direction to collect may be as follows:*) That said receiver be, and he hereby is, directed to demand, collect and receive from the tenant or tenants in possession of said premises (or other persons liable therefor), all the rents therefor now due and unpaid and all rents hereafter to become due.

(*Direction that tenants pay.*) That the tenants in possession of such premises and other persons liable to such rents are hereby enjoined and restrained from paying any rent for such premises to the defendant, his agents, servants or attorneys.

(*Direction to surrender possession.*) That all persons now or hereafter holding possession of said premises, or any part thereof, and not holding such possession under valid and existing leases, do forthwith surrender such possession to said receiver.

(*Power to recover and protect possession.*) That the said receiver be, and hereby is, authorized to institute and carry on all legal proceedings necessary for the protection of all premises described in the complaint or referred to in this order, including such proceedings as may be necessary to recover possession of the whole or any part of said premises, and to institute and prosecute suits for the collection of rents now due or hereafter to become due on the aforesaid premises or any part thereof, and to

¹ See *ante*, chap. X.

institute and prosecute summary proceedings for the removal of any tenant or tenants or other persons therefrom.

(Power to rent, insure, repair, etc.) And said receiver is hereby authorized from time to time to rent or lease, as may be necessary, for terms not exceeding one year, any of said premises; and to keep the property insured against loss or damage by fire, and in repair, and to pay the taxes, assessments and water rates *(in case of ground rent and the rent reserved by said mortgaged lease)* upon said premises.

(Power to employ agent.) And said receiver is hereby authorized to employ an agent, if he shall deem proper, to rent and manage said premises, collect the rents and keep the premises insured and in repair, and to pay the reasonable value for his services out of the rent received.

(Injunction against defendant receiving rent.) That during the pendency of this action the defendant and his agents and attorneys be enjoined and restrained from collecting the rents of said premises, and from interfering in any manner with the property or its possession.

(Direction as to applying rents, etc., in foreclosure.) That the said receiver retain the moneys which may come into his hands by virtue of his said appointment until the sale of the premises mentioned in the complaint under the judgment to be entered in this action, and that he then, after deducting his proper fees and disbursements therefrom, apply the said moneys to the payment of any deficiency there may be of the said amount directed to be paid to the plaintiff, in and by the said judgment, and, in case there be no such deficiency, that he retain the said moneys in his hands until the further order of the court in the premises.

(Bond clause.)

(Leave for further directions.) That the said receiver and any party hereto may at any time, on proper notice to all parties who may have appeared in this action, apply to this court for further or other instructions, and for further power necessary to enable said receiver properly to fulfill his duties.

No. 21.

ORDER TO SHOW CAUSE WHY A RECEIVER SHOULD NOT BE APPOINTED AT THE SUIT OF THE PEOPLE OR A STOCKHOLDER, OFFICER OR CREDITOR, FOR MISCONDUCT OF DIRECTORS, ETC.

(TITLE.)

Comes now the plaintiff —, by his attorney, and on motion, supported by the affidavit of said —, moves for a rule requir-

ing the defendant to show cause why the said individual defendants should not be compelled to account for their official conduct in the management and disposition of the funds and property of the defendant, the — Company, committed to their charge as officers thereof.

And why the defendants above named, and each of them, should not be enjoined and restrained from collecting or receiving any debt or demand, and from paying out or in any manner interfering with any money, property or effects of the defendant, the — Company, during the pendency of this action.

And why a receiver or receivers of the property (*describing it*) of the defendant, the — Company, should not forthwith be appointed by this court with the usual powers of receivers in like cases.

No. 22.

BOND OF RECEIVER. (PARTNERSHIP).¹

KNOW ALL MEN BY THESE PRESENTS, that we —, principal, and — and —, as sureties, are held and firmly bound unto —, clerk of this court (*or the People of the State of —*), in the sum of — dollars, for the payment of which, well and truly to be made, we, and each of us, bind ourselves respectively and our respective heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the — day of —, 189—.

Whereas, by an order of the — court of — bearing date the — day of —, 189—, made at the — term thereof, held on said day at —, in an action wherein — is plaintiff, and — and others are defendants, the above-bounden — was appointed receiver of the partnership property and assets of said plaintiff and defendants:

Now, the condition of this obligation is such that if the above-bounden — shall, according to the rules and practice of the court, duly file his inventory, and annually, or oftener if thereunto required, duly account for what he shall receive or have in charge as receiver in the said cause, and pay and apply what he shall receive or have in charge as he may from time to time be directed by the court, and do and perform his office of receiver in all things according to the true intent and meaning of the aforesaid order; (or any other and all other orders of said court.)

(*Or*, that if the above-bounden — shall faithfully discharge

¹ See *ante*, chap. II., § 23; chap. XXII., § 379.

his duties as such receiver and shall duly account for all moneys received by him, and shall obey all orders of said court;)

Then this obligation shall be void, otherwise to remain in full force.

_____(SEAL.)
 _____(SEAL.)
 _____(SEAL.)

Taken and approved this ____ day of ____, 189-.

Judge.

No. 23.

ANOTHER FORM OF BOND.¹

KNOW ALL MEN BY THESE PRESENTS, that we ____, principal, and ____ and ____, as sureties, are held and firmly bound unto the People of the State of ____, in the sum of ____ dollars, lawful money of the United States of America, to be paid to the People of the State of ____, for which payment, well and truly to be made, we, and each of us, bind ourselves respectively and our respective heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this ____ day of ____, 189-.

Whereas, by an order of this court bearing date the ____ day of ____, at the ____ term thereof held on said day in an action wherein ____ was plaintiff and ____ was defendant, the above-bounden ____ was appointed receiver of the property and assets of (plaintiff's and defendant's property, *if a partnership matter, or whatever the facts may be*).

Now, the condition of the above obligation is such that if the said ____ shall, according to the rules and practice of this court, faithfully discharge his duties as receiver herein, obey each and all of the orders of this court touching his duties and administration of said estate, and duly account for what he shall receive or have in charge as such receiver, and pay over and apply the same as directed by the court, and perform the duties of his office of receiver in all things according to the true intent and meaning of this order, then this obligation shall be void, otherwise to remain in full force and effect. (*If the statute prescribes a form of bond then in such case follow the form of such bond strictly.*)

_____(SEAL.)
 _____(SEAL.)
 _____(SEAL.)

¹ See *ante*, chap. II., § 28; chap. XXII., §§ 377-380.

No. 24.

SHORT FORM OF BOND.¹

KNOW ALL MEN BY THESE PRESENTS, that we — as principal, and — as surety, all of the county of — and state of —, are held and firmly bound unto the People of the State of —, in the sum of — dollars, for the payment of which sum, well and truly to be made, we, and each of us, bind ourselves, jointly and severally, and our respective heirs, executors and administrators, firmly by these presents.

Signed, sealed and dated the — day of —, 189—.

The condition of the above obligation is such, that whereas, by an order of the — court of — county sitting in chancery, made on the — day of —, 189—, in a cause therein pending, wherein — is complainant, and — defendant, it was among other things ordered, that the above-bounden — be appointed receiver of all the property, equitable interests, things in action and effects of the defendant — except such as are by law exempt, and that he be vested with all the rights and powers of a receiver in chancery, upon his filing a bond for the faithful performance of his duties, in the penal sum of — dollars, and the approval thereof.

Now, therefore, if the said — shall duly account for what shall come to his hands or control as such receiver, and pay and apply the same from time to time as he may be directed by said court, and obey such orders as said court may make in relation to said trust, and in all respects faithfully discharge the duties of said trust, then the above obligation to be void, otherwise to remain in full force and virtue.

Approved, }

_____ }

_____(SEAL.)
_____(SEAL.)
_____(SEAL.)

No. 25.

ASSIGNMENT (GENERAL) TO RECEIVER OF PARTNERSHIP ASSETS.²

THIS INDENTURE, made the— day of —, 189—, between — and —, heretofore partners in trade, doing business in the city of —, under the title of —, of the first part, and —, re-

¹ See *ante*, chap. II., § 23; chap. XXII., §§ 377-379.

² See *ante*, chap. II., § 22.

ceiver of the estate and effects hereinafter referred to, appointed by the — court, of the second part, witnesseth :

Whereas, by an order of the said court made at the — term, in an action wherein the said — was plaintiff and the said — was defendant, the said party of the second part was appointed such receiver, and has given and filed the requisite bond pursuant to law and said order ;

Now, this indenture witnesseth, that the said parties of the first part, in obedience to the said order, and in consideration of the premises aforesaid, and of one dollar to them in hand paid by the said party of the second part at or before the execution hereof, the receipt whereof is hereby acknowledged, have, and each of them has, conveyed, assigned, transferred and delivered over, and by these presents do, and each of them does, convey, assign, transfer and deliver over, unto the said party of the second part, under the direction of the said court, all and every the stock in trade, good will, estate real and personal, chattels-real, moneys, outstanding debts, things in action, equitable interests, property and effects whatsoever and wheresoever, of or belonging to the said firm, or to the said parties of the first part as partners therein, the said firm, or they or either of them as such partners therein, had any estate, right, title or interest at the time of the commencement of said action, to wit, on the — day of — last ; and also all deeds, writings, leases, muniments of title, books of account, papers, vouchers and other evidences whatsoever relating or appertaining thereto.

To have and to hold the same unto him, the said party of the second part, as such receiver as aforesaid, and to his successors and assigns, subject to the order, direction and control of the said — court. And for better and more effectually enabling the said party of the second part, his successors and assigns, to recover and receive any part of the stock, estate, book-debts, property, choses in action and effects hereby conveyed, assigned and transferred, they, the said — and — have made and appointed, and by these presents do make and appoint, the said —, party of the second part, his successors and assigns, the attorney of them, the said parties of the first part, in their names or in his own name, to commence, continue, discontinue and again bring, perfect, and carry out actions and suits and special proceedings against any persons or corporations for or on account of all or any part of the said estate, stock, property, book-debts, choses in action or effects.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signature.) (SEAL.)

(Acknowledgment.)

No. 26.

NOTICE BY RECEIVER TO CREDITORS AND DEBT-
ORS OF APPOINTMENT AND NOTICE TO PRE-
SENT CLAIMS.

(CAPTION.)

TO ALL WHOM IT MAY CONCERN:

Notice is hereby given that I have been appointed by the — court of the state of —, in said action, receiver of the — Company, and of all its property and effects, and that I have duly qualified as such receiver, and I do require as follows:

1. All persons indebted to said corporation to render an account to me, at my office, No. —, — street, in the city of —, and county of —, in said state, by the — day of —, 189—, of all debts and sums of money owing by them respectively, and to pay the same to me.

2. All persons having in their possession any property or effects of said company to deliver the same to me by the said day.

3. All the creditors of said corporation to deliver their respective accounts and demands to me by the said day.

4. All persons holding any open or subsisting contracts of said corporation, to present the same, in writing and in detail, to me, at the place aforesaid, on or before the said day.

Dated this — day of —, 189—.

—, Receiver.

No. 27.

ORDER ON CREDITORS TO EXHIBIT CLAIMS.

(TITLE.)

It is ordered that a notice be published, as hereinafter directed, requiring all the creditors of said — Company, and all persons having claims of any kind against it, to exhibit the same to said receiver, at a place to be specified in such notice.

That said notice be published once a week for —, in a newspaper published in —, and also in a paper published in the city of —.

No. 28.

ORDER APPOINTING SPECIAL COMMISSIONER TO
HEAR AND REPORT CLAIMS.

(CAPTION.)

It is ordered by the court that all suits and proceedings against the receiver herein upon any cause of action or claim against the

— Company, accruing prior to the — day of —, 189—, be brought only by intervening petition filed in this cause; also that no process of attachment or execution, or other final process whatever be issued against said receiver for any act of his in the operation of the — Company, otherwise than upon leave granted by this court upon intervening petition.

It is further ordered that — be, and he hereby is, appointed commissioner of this court to hear and consider the above claims, and all other claims against the receiver herein, growing out of the business of said company as may be brought before him; and that the said commissioner have power to hear and consider all such claims, and that the receiver herein be directed to appear before the said commissioner upon short notice served upon said receiver, or upon an agent authorized by him to be served in his stead, to answer any claim filed with the said commissioner; and that said commissioner have the power to take testimony and report the same with his findings to this court, and that unless such claimant, or receiver, shall within thirty days after the filing of the said report appeal from the same to this court, said report shall at the expiration thereof become final; and the said receiver is hereby directed and authorized thereupon to pay out of any money coming into his hands such amount or amounts as the commissioner may award on said claim or claims.

It is further directed that said receiver do not hereafter in any case appear to answer any garnishment in any suit against any of his employees, but that all claims against said employees be presented to the said commissioner hereinbefore appointed; and that upon his notice of such claim the said receiver shall forthwith notify said employee, and shall withhold from said employee, from money otherwise due, a sufficient amount to satisfy said claim, and that upon order of said commissioner the same shall be paid either to the said employee or to the said claimant, as said commissioner may direct and adjudge.

— — —
Judge.

No. 29.

ORDER APPOINTING COMMISSIONER OR REFEREE
TO HEAR AND REPORT CLAIMS. (RAILWAY.)

(CAPTION.)

It having been represented to the court that claims have accrued in — against the receivers appointed and confirmed in this case, growing out of the operations of the railway property in — for stock killed, personal injuries, damages to freight,

damages for short delivery, etc., and it appearing to the court that such claims will constantly accrue during the pendency of the receivership in this case, and that such claims should be adjudicated, settled, and paid without requiring the parties interested therein to seek relief from the court.

It is therefore ordered by this court that —, Esq., be and he is hereby appointed special commissioner in chancery (*or* referee, *as the case may be*) for this cause; and

It is further ordered that all claims for damages of every kind that have accrued or may accrue against the said receiver, growing out of his operation of the — company in —, may be filed and presented to said commissioner, who shall examine and report thereon in due course.

That the special commissioner (*or* referee) be and is directed to give reasonable public notice of this order, and is authorized to hold sessions pending examination of claims at such points as he may designate.

He shall report his conclusions to the court from time to time, and such reports shall stand confirmed, unless excepted to within — days from the filing thereof, upon proper order entered therefor.

Dated —.

—, Judge.

No. 30.

ORDER TO PAY CLAIMS ACCRUING AGAINST RAILWAY COMPANY PRIOR TO THE APPOINTMENT OF THE RECEIVER.

(CAPTION.)

It is hereby ordered that the receiver herein pay out any funds in his hands and applicable to the business of the — Company, being operated by him under the order of the court herein, and all claims accruing during the period of (six months) immediately prior to the appointment of the receiver herein, for supplies, materials, wages, salaries, and expense incurred by agents and employees, traffic balances with other common carriers, injury to or loss of property of shippers in transit, and for the use of the tracks, terminals, or other facilities of other railways used by the said — Railway Co. in the ordinary transaction of its business.

—, Judge.

No. 31.

ORDER REQUIRING DEFENDANT TO TURN OVER
TO RECEIVER BOOKS, PLATS AND DEEDS.

(CAPTION.)

At this day the petition of the receiver for an order directing the defendant, the — Company, to deliver to him certain deeds, records, plats, surveys and other muniments of title to the real property in their possession under the order of this court having been presented to this court, and the court having duly considered the same, it is ordered that the said — Company deliver to said receiver all deeds of conveyance, records, plats, surveys and books, and all other papers and muniments of title in their possession or under their control pertaining to or affecting the title or right to the possession of the real estate in the possession of the receiver under the orders of the court, or show cause on the — day of —, at 10 A. M., before me at the — court-room in the city of —.

Dated —.

—, —,
— Judge.

The foregoing order made absolute, and the receiver and — Company hereby directed to make schedule, and receiver hereby directed to receipt for same.

Dated —.

—, —,
— Judge.

No. 32.

PETITION BY RECEIVER TO COMPEL THE PAYMENT
AND DELIVERY OF SPECIFIC ASSETS.

(CAPTION.)

To the — Court:

—, upon his oath, says:

That by an order made in this cause, dated —, 189—, your receiver was duly appointed as the receiver of (*briefly indicating what*).

That on the — day of —, 189—, your petitioner, entered into a bond to the clerk of said court (if given to the clerk), conditioned for the faithful discharge of his duties as such receiver, and he took the oath prescribed by law.

That (within the week preceding the commencement of this

action *or as the case may be*) the plaintiff collected the following sums of money due and payable to said firm from the following named creditors:

(Here give particulars.)

That said plaintiff omitted to place said money with the other moneys of said firm, namely: *(describing them.)*

That said plaintiff refuses to place said sum of — dollars in the hands of your petitioner, and also refuses to deliver said assets to him.

Wherefore, *(etc., demand relief such as is given by an order to pay or deliver).*

No. 33.

AFFIDAVIT FOR MOTION TO COMPEL TENANTS TO PAY.

(CAPTION.)

———, being duly sworn, on oath says:
That by an order made in this cause, bearing date the — day of —, 189—, it was ordered that the several tenants of the lands and premises in the pleadings mentioned should pay their rents and arrears of rent to this deponent as receiver in this cause, and also their rents accruing thereon from time to time as the same shall become due and payable.

That the several persons whose names are set forth in the schedule annexed to this affidavit, and who are respectively tenants of said lands and premises, as deponent believes, have not paid rent to deponent (*nor*, to — —, the late receiver in this cause before his appointment, as deponent believes; *or*, as appears by the late receiver's account, filed the — day of —, 189—, in the office of — —), since his appointment as receiver in this cause.

That the several tenants in said schedule named owe respectively, according to this deponent's knowledge, calculation and belief up to the respective rent days specified in the said schedule, the several sums as set forth in said schedule, for rent and arrears of rent of their respective holdings, which sums, or any part thereof, the said tenants so respectively owing the same, or any of them, have not paid to deponent, although repeatedly applied to for that purpose.

———,
Receiver.

(Jurat.)

No. 34.

AFFIDAVIT TO OBTAIN ORDER STAYING OTHER
ACTIONS AFFECTING ASSETS.

(Ancillary Receivership.)

(CAPTION.)

_____, being duly sworn, says:
That he is the plaintiff's attorney herein.

That this action was brought for the appointment of a receiver of all the property and assets of the _____ Company in the state of _____ (ancillary to the appointment of a receiver of said Company in the state of _____).

That on the _____ day of _____, 189-, this court duly made an order, at a special term thereof, appointing _____ receiver of all the property and assets of the said Company within this state (with all the powers vested in him as receiver by the court of _____, of the state of _____), and that in and by said order the officers and directors of the defendant were enjoined from exercising within this state of _____, any of the privileges or franchises granted to the said corporation.

That thereafter the said receiver duly qualified as required by law, and duly entered into the possession of all the property of the said company, including the books, papers and vouchers, and is still in possession thereof.

That a number of actions have been commenced against the said _____ Company, in various parts of this state since the appointment of said receiver, and attachments in some cases have been levied upon its property.

That the said _____ Company is unable to defend such actions or any actions for the following reasons:

First. That all the books, papers and vouchers of the said _____ Company are in the hands of the receiver, and are being actually used in making up the statement of said receiver.

Second. Its officers and agents are restrained and enjoined by said order from exercising privileges or franchises granted to the said corporation, and they are therefore restrained and enjoined from carrying on their defense to any of said actions.

(Deponent further says that in a proceeding under the insolvency act of the state of _____, a receiver has been duly appointed by the court of _____, of the state of _____, of the property of the _____ Company, being the same receiver appointed in this state, and to which receivership the appointment in this state is ancillary.)

Deponent further says that great embarrassment is likely to ensue to the receivership and to the trust company by reason of the pendency of said actions. That the plaintiffs in said actions

threaten to enter judgments with costs, and that the expenses will thereby be increased; that all the property of the — Company being in the hands of the court, said — should be required to file their claims in court according to the practice in such case made and provided.

(*Jurat.*)

No. 35.

PETITION OF RECEIVER FOR PERMISSION TO DEFEND SUITS AND COMPROMISE CLAIMS.¹

(CAPTION.)

Your petitioner, —, would respectfully show to your honors that, prior to his appointment as receiver herein, certain suits had been brought against the — Company, praying for damages to persons or property; that under the laws of the state of —, such claims, when reduced to judgment, are liens prior in right to the mortgage given by the defendant upon its property, and that there are certain suits pending in the — court of the state of —.

Your petitioner further shows that such suits or claims can generally be compromised and adjusted at sums which it is to the interest of the defendant and its creditors to promptly accept, thereby saving much cost of litigation and other considerable amounts as compared with the usual expense and the results of such litigation; and that other of said suits will have to be defended by your petitioner as receiver at the cost of the fund in the hand of your petitioner.

Your petitioner therefore prays that an order of court be made herein, authorizing your petitioner as receiver to appear and defend the suits that have heretofore, or may hereafter, be brought in this state against the defendant to recover damages for injuries to persons or property, or for any claim whatsoever, and that your petitioner be given the right and discretion to compromise, adjust and settle all suits or claims against the defendant for damages to persons or property, or any claims arising in the operation of the road committed to his charge, if, in the judgment of his counsel, it is proper to compromise, adjust and settle such cases or claims, upon such terms as may be agreed upon between him and the litigants or claimants, and he will ever pray, etc.

Receiver.

¹ Loveland's Forms of Fed. Proc. No. 303.

No. 36.

PETITION BY RAILWAY RECEIVERS FOR AUTHORITY TO SETTLE TRAFFIC BALANCES.¹

(CAPTION.)

Petition by the receivers for authority to adjust, settle, and pay traffic balances between the — Company and other railroads.

—, receivers of the — Railway, respectfully show :

I. By the decree made in this case on the — day of —, and filed herein on the — day of —, being the decree appointing your petitioners receivers, among others the following order was made :

(*"Fifth. The matter of the payment of balance due or to become due to other railroads or transportation companies growing out of the exchange of traffic is reserved for further orders."*)

II. Since which your receivers have taken possession of the — Railway, operated by your receivers, and other railways and transportation companies. These traffic balances consist generally of :

First. Freight balances, which are amounts found to be due as between freight delivered to connecting lines by the — Railway, and received from connecting lines by said Railway.

Second. Ticket accounts. These result from the sale of coupon tickets by the — Railway over foreign lines, and the sale by foreign lines of such tickets over the — Railway.

Third. Mileage accounts. These accounts comprise the mileage of the cars of other railway companies over the line of the — Railway, and the mileage of its cars over other railways.

These traffic balances are sometimes in favor of one road, sometimes in favor of the other. It is vitally necessary in the transaction of railway business that these traffic balances should be promptly paid by the respective railways at stated times.

III. There are traffic balances which will soon have to be discharged arising out of the operation of the railway in charge of your receivers, which will have to be settled, adjusted, collected or paid within a short time, and your receivers should have full authority to adjust, settle, collect, or pay them according to the prevailing usage existing among railway companies, so that there may be no interruption of the relations between the railway in charge of your receivers and other railways of the country.

Wherefore your petitioners pray that an order be entered granting them authority to adjust, settle, collect and pay all

¹ Loveland's Forms of Fed. Proc. No. 800.

traffic balances arising out of the operation of the ——— Railway since ———, 189—, and which may hereafter arise from time to time.

Solicitors for the Receivers.

STATE OF ———, }
County of ———, } ss.

I, _____, on oath, state that I am one of the receivers of the ——— Railway; that I have read the foregoing petition, and that the facts therein stated are true, as I verily believe.

Subscribed and sworn to before me, this ——— day ———.

[SEAL.]

Notary Public.

No. 37.

ORDER AUTHORIZING RECEIVER TO SETTLE TRAFFIC BALANCES.¹

On this day the petition of the receivers for authority to adjust, settle, collect, and pay all traffic balances arising in the operation of the ——— Railway since ———, 189—, when the receiver took possession of said Railway, having been presented to the court, and the court having fully considered the same, and being fully advised in the premises, it is ordered that the receivers be, and they hereby are, authorized to adjust, settle, collect and pay all traffic balances between the railway in their charge and other railroads or transportation companies arising out of the operation of the ——— Railway since ———, 189—, and which shall hereafter arise, according to the usual methods prevailing among the railroad and transportation companies of this country.

— Judge.

No. 38.

ORDER TO PAY RENT.²

(CAPTION.)

This day came the receiver and represented to the court that the instalment of rent due to the ——— Railway Company, the ——— day of ———, 189—, under the lease referred to in the bill herein, has not been paid, and that the period of ninety days' grace

¹ Loveland's Forms Fed. Proc. No. 301.

² Loveland's Forms Fed. Proc. No. 302.

provided in said lease will expire the — day of —, 189—, and that said receiver expects to have on hand sufficient funds to pay said rental on or before said last-named date, and asks authority of the court to make such payment, and therefore it is ordered by the court that the receiver be, and he hereby is, authorized to make such payment.

— Judge.

No. 39.

RECEIVER'S PETITION FOR LEAVE TO SELL.

(CAPTION.)

Your petition respectfully represents that the defendant is owner of certain real property known and described as follows: (*Description of the premises, and also what interest the defendant has, what encumbrances there are upon it, and its value.*)

(*State reasons for asking a sale, for example, in creditor's suit thus:*) That your petitioner has found no goods or chattels or choses in action of the said — out of which any money can be realized by collection, suit or sale; and that the said land is the only available property.

Wherefore, your petitioner asks for an order authorizing him as such receiver to sell said land at public sale, and convey all the right, title and interest of the said — which he has in and to said premises, and for such other or further order as may be just (and for the costs of this application).

No. 40.

ORDER GIVING RECEIVER LEAVE TO PAY SECURED CLAIM.

(TITLE.)

It is ordered that said — receiver, as aforesaid, be and he is hereby authorized and empowered to sell and dispose of the said (*specify generally*) hereinbefore referred to, and fully described and specified in the said petition, at private sale, at the best price he can obtain therefor in cash, not less than the sum of — dollars.

That out of the proceeds of such sale he be, and he hereby is, authorized and empowered to pay the principal and interest due and unpaid upon the said — upon said articles in the said petition specified, and to cause the same to be satisfied and discharged, retaining any balance of the proceeds of such sale in his hands as receiver, to be accounted for, and to abide the further order and decision of this court.

That said receiver be, and he hereby is, authorized and empowered to sell and dispose of the remaining property and assets now in his custody undisposed of, or which, at the time of sale, shall be in his custody and control undisposed of, at public sale to the highest and best bidder, on due public notice thereof, and at such time or times as he shall deem most convenient and proper between now and the — day of — next.

No. 41.

ORDER DIRECTING A SALE OF PERISHABLE PROPERTY IN THE HANDS OF A RECEIVER.

(TITLE.)

Upon consideration of the petition or report of the receiver, it is ordered that —, the said receiver, be, and he hereby is, authorized to sell the goods, wares and merchandise in the said report mentioned, for cash (or on a credit of — for approved notes, as the case may be) according to the usual course and manner of selling goods at public sale.

Judge.

No. 42.

ORDER CONFIRMING RECEIVER'S SALE.

(TITLE.)

(Recite filing of receiver's report, without setting it out at length.) It is hereby ordered that the aforesaid sale be, and the same hereby is, confirmed, and the said receiver is hereby authorized to convey to the said purchaser the following described property: *(Insert description)* and upon receiving from said purchaser the sum of — dollars, the balance of said purchase money, the said receiver is hereby authorized to deliver to said purchaser a deed of said property in the usual form.

No. 43.

PETITION OF RECEIVER TO COMPEL PURCHASER TO COMPLETE PURCHASE.

(CAPTION.)

Your petitioner respectfully represents: *(Here state circumstances of sale of assets and order of court obtained granting leave to sell.)*

That, thereafter, your petitioner served said — with a notice that your petitioner was ready to complete said transaction.

That, thereafter, said purchaser submitted to your petitioner's said counsel such papers as he desired executed for a complete transfer of said (*naming them*), and your petitioner duly executed and acknowledged the said —, and demanded the performance of said agreement on his part, but he has hitherto failed (and refused) to perform the same.

Wherefore, your petitioner prays for an order requiring the said purchaser to perform said contract on his part and to pay to your petitioner, upon receipt of said assignment and other papers for the transfer of —, the said sum of — dollars, besides the costs of this application.

No. 44.

ORDER THAT PURCHASER FROM RECEIVER
COMPLETE HIS PURCHASE.

(TITLE.)

(Recite filing of petition for an order and its consideration.)

It is ordered that the said purchaser, within — days from the service of a copy of this order upon him (*or, on —, his attorney*), perform the contract in the said petition of said receiver mentioned, and pay to said receiver or to his attorneys, in performance of the said contract, the sum of — dollars, besides — dollars, costs of this motion.

No. 45.

PETITION OF RECEIVER FOR AUTHORITY TO PAY
COUNSEL FEES.

(CAPTION.)

Your petitioner respectfully represents that he has employed as his attorney and counsellor in the above matter —, and that in the course of his business as receiver he finds it necessary to frequently, and indeed almost constantly, consult with counsel.

That your petitioner believes it will be necessary to require much of the time of counsel until the estate in his hands is wound up, and that in view thereof he believes it for the interest of the estate that the employment of said counsellor should be continued, and that a proper fee as retainer and on account of his said service should be now paid to him.

Wherefore, your petitioner prays directions: 1st. As to the employment of legal assistance. 2d. As to the amount which shall be now paid to said counsel on account of such assistance.

No. 46.

ORDER SANCTIONING RECEIVER'S EMPLOYMENT
OF COUNSEL.

(TITLE.)

(Recite filing of petition and consideration.) It is ordered that the acts of said receiver in respect to the employment of an attorney and counsellor be, and he hereby is, confirmed, and he is hereby directed to continue the same.

That the said receiver is hereby directed now to pay said counsellor as retainer the sum of — dollars, and on account of services rendered by him the sum of — dollars, out of the moneys in said receiver's hands to the credit of the above-entitled cause.

No. 47.

PETITION BY RECEIVER FOR LEAVE
TO PAY CLAIMS.

(CAPTION.)

Your petitioner represents that before his appointment as receiver a judgment was obtained against the defendant company by —, in the — court, and that an execution was issued and a levy made thereunder by the sheriff before his said appointment. That the sheriff threatens to enforce his levy unless the amount thereof, with costs, amounting in all to — dollars, be forthwith paid, and your petitioner is advised by his counsel to settle the same at once.

Wherefore, your petitioner prays that he may be authorized to pay said judgment.

No. 48.

NOTICE OF MOTION BY A PARTY TO THE CAUSE
FOR INSTRUCTIONS TO THE RECEIVER.

(CAPTION.)

To ———, Receiver:

Please take notice that the undersigned will move the above-named court, at the court-house in the city of —, —, on the — day of —, 189—, at — o'clock in the —noon, or as soon thereafter as counsel can be heard, for instructions directing the receiver heretofore appointed in this action (*here specify what directions are sought, thus:*) to proceed in the further discharge of his duty in disposing of the copartnership

property and effects; and that he be authorized and directed to sell the entire stock in trade of said copartnership at private sale to ———, at the sum agreed upon, to wit: (etc., etc., *stating terms*), and for such other or further order as may be just.

Dated ———, 189—.

I hereby acknowledge service of the above notice this ——— day of ———, 189—.

No. 49.

PETITION THAT RECEIVER BE INSTRUCTED TO
PAY OVER A DEPOSIT OR OTHER FUND BE-
LONGING TO THE PETITIONER.

(CAPTION.)

To the ——— Court:

Your petitioner represents:

That the ——— Bank has been for several years prior to the ——— day of ———, 189—, a banking corporation existing under the laws of this state, and having its place of business at ———.

That on said last-mentioned day, having theretofore become insolvent, it suspended its business.

That on the ——— day of ———, 189—, ——— was duly appointed receiver thereof by this court, and thereafter duly qualified as such and entered on the discharge of his duties, and is now such receiver.

That after said bank had become insolvent and was known to its officers so to be, and immediately before such suspension, your petitioner, who was then a depositor in said bank, but was ignorant of such insolvency, deposited with it to be credited in his account (*Describing the fund*).

[(*Or*) That prior to the time of the failure of the said ——— Bank your petitioner had sent notes, belonging to your petitioner, to it for collection, of which said bank was to receive ——— dollars, as compensation.]

That said bank, as your petitioner is informed and believes prior to said ———, 189—, had collected a large amount of said notes so sent to it for collection, and had placed the amount so collected on its books as a fund belonging to your petitioner, separate and apart from other funds in said bank.]

That the said deposit (*or*, the fund so collected, and so set apart on the books of said ——— Bank as belonging to your petitioner), remained there at the time of the appointment of said ——— as

receiver, and is now in the possession and under the control of said receiver.

That prior to the making of this petition your petitioner duly demanded of said receiver that he pay said amount to your petitioner, but said receiver has failed so to do.

Wherefore your petitioner asks that said receiver be directed to deliver to your petitioner (the said money, *or as the case may be*), and pay him the costs of this motion, and for such other or further order as to the court may seem just.

No. 50.

PETITION THAT RECEIVER SURRENDER POSSESSION, PAY, ETC., OR THAT PETITIONER HAVE LEAVE TO BE EXAMINED *INTERESSE SUO*.

(CAPTION.)

To the ——— Court:

(*State claim.*)

Wherefore your petitioner asks that said receiver be directed to pay (*etc., or deliver, etc., according to the case*), or that your petitioner be allowed to come in and be examined *pro interesse suo* as to whether his rights in and to said — are not superior to the rights of said receiver and those whom he represents, and that at the close of said examination the court make such order as to the disposition of said — as to the court may seem just.

And your petitioner further prays that he may have such other or further relief as may be just (together with the costs of this motion).

No. 51.

NOTICE OF RECEIVER'S PETITION FOR DIRECTIONS AS TO DISTRIBUTION.

(CAPTION.)

To ——— :

Please take notice that I shall apply to the — court, at the next term to be held at —, on the — day of —, 189—, at — o'clock in the — noon, for an order directing what course I am to take in reference to the uncollected notes and accounts, and the furniture in my possession, and also for the approval of my accounts as receiver, and an order discharging me from further liability, and also for an order determining your respective priorities, and my duties as to paying your various claims out of the

surplus that may remain in my hands, or out of any other moneys that I may have collected.

Dated —, 189—.

Received service of the above notice this — day of —, 189—.

No. 52.

PETITION OF RECEIVER TO BE ALLOWED TO ACCOUNT AND TO BE DISCHARGED.

(CAPTION.)

(Recite appointment.) That your petitioner has since then performed the duties of his office and executed all the trusts of the same, so far as he has been able to do so, and has collected all the assets known to him of said corporation; that he has duly advertised for all claims against the same, and discharged all claims presented; and that there are no creditors of said corporation to the knowledge of your petitioner *(or state exceptions, if any, so that the order may reserve them)*.

That according to the accounts of your petitioner annexed there remain, after paying the necessary expenses and charges of said trust, together with a proper compensation to the receiver, no assets of value for distribution among the stockholders *(or creditors as the case may be, or state what, if any)*.

That no suits or legal proceedings in respect to said corporation or receivership property are now pending to the knowledge of your petitioner; nor does any duty remain to be performed by said receiver except to have his accounts finally settled *(or state exceptions, if any, so that the order may reserve them)*.

Wherefore your petitioner prays that this court may finally settle and allow his accounts as such receiver, and award him suitable compensation for the performance of his said duties, and for an order relieving and discharging your petitioner as said receiver, and ordering his bond to be canceled, and for such other and further order as may be just.

No. 53.

ACCOUNT RENDERED BY RECEIVER.

(CAPTION.)

To the — Court:

I, the undersigned —, render the following account of my proceedings as receiver of the rents, issues and profits of the

premises described in the complaint herein, which are known and designated as Nos. —, — street, in the city of —.

I was appointed as such receiver by an order made and entered in the above-entitled action on —, 189—.

(State facts as to administration of the trust, so far as material to explain and justify the account, as thus:)

(Agency for collection.) I thereupon proceeded to appoint an agent for the collection of said rents, under the power vested in me by said order, and in the following statement of my account I have credited myself with the payment to said agent of — per cent commission upon all the moneys collected by him during the continuance of my said trust.)

(Sale of uncollectible assets.) After having collected all the collectible assets except a disputed claim on a guaranty, which by leave of this court I compromised in receiving the sum of — dollars, the remainder of the assets pursuant to leave of this court first obtained, I sold at public auction at —, on the — day of —, 189—, first giving due notice as is required by law in this case of execution sales (of personal property) by the sheriff (or, as was required by said leave of court). At such sale all of said property was sold to the highest bidder for sums aggregating — dollars.)

(And so with other transactions.)

Schedule A, hereto annexed, contains a statement of all the moneys received or collected by me or my said agent.

Schedule B, hereto annexed, contains a detailed statement of all moneys expended by me in the execution of my said trust, together with the object of such expenditure.

All the receipts, statements and vouchers hereto annexed form part of this count.

I charge myself as follows:

Gross receipts as shown by Schedule A - - - \$—.

I credit myself as follows:

Total expenditures as shown by Schedule B - \$—.

Leaving a balance of - - - - - \$—.

Which consists of *(state items, as cash in a designated trust company, or unrealized assets, etc.)*, to be distributed, subject, however, to the deduction of the amount of my commission and the expenses of this accounting.

The said schedules, which are severally signed by me, are part of this account.

No. 54.

OBJECTION TO RECEIVER'S ACCOUNTS.

(CAPTION.)

—, a judgment creditor of —, for himself and others

similarly situated, makes the following objections to the accounts of —, receiver herein, filed the — day of —, 189—:

(State them.)

(1) That —.

(2) That —.

No. 55.

NOTICE OF MOTION TO REVOKE APPOINTMENT.

(CAPTION.)

To — (receiver):

(Object of motion may be stated thus:) That the said appointment of —, as receiver, may be revoked, and that the court appoint a new receiver in this action, and take the requisite security.

Dated —, 189—.

(Acknowledgment of service.)

No. 56.

ORDER DISCHARGING RECEIVER.

(TITLE.)

It is ordered that —, receiver in this action, be, and he hereby is, discharged from any further duty and office as such receiver, except as hereinafter set forth.

That the said receiver immediately turn over the possession of the lands and premises described in the complaint in this action (or otherwise designate property) to the defendants — and —, together with all papers, leases and documents relating to such property or to the tenants and terms of occupation thereof now or hereafter in his possession, or in any manner under his control, and that he pay to such defendants (as the case may be) all moneys by him collected since —, 189—, first deducting therefrom his commission and other charges (if any) to him by law allowed.

(Reservation of liability of company for unsettled claims.) It is further ordered and decreed that all said claims pending in this court, whether debts or other liabilities, shall be presented to said — Company for adjustment and settlement, and said Company is ordered to pay said debts, with the costs and expenses allowed by law; and for the purpose of enforcing the payment thereof, and if need be, this court will and does retain jurisdiction and full power to enforce such payment and the lien heretofore existing, without other action or independent proceedings.

No. 57.

ORDER REMOVING RECEIVER AND APPOINTING
SUBSTITUTE.

(TITLE.)

(Recite petition and hearing to remove, if such is the case.) It is ordered that — be, and he hereby is, removed from the office of receiver herein *(may state ground if desired)* and that — is hereby appointed receiver herein with the powers and duties conferred by the order entered herein the — day of —, 189— *(or may specify them)*.

(Bond clause.)

That upon the filing of said bond so approved, in the office of the clerk of this court, said — do forthwith deliver over to said —, receiver herein, all books, papers, evidences of debt, accounts, notes, bills, bonds and property of all and every description belonging to said corporation, which may have heretofore come into his hands as receiver herein, and conveyed all real estate to said —, as receiver herein, his successors and assigns and their heirs, which deed or deeds shall contain a covenant against the act of the said —, and shall be approved as to form by the judge of this court.

No. 58.

NOTICE OF MOTION TO DISCHARGE RECEIVER.

(CAPTION.)

You are hereby notified that on the — day of —, 189—, at — o'clock in the —noon, or as soon thereafter as counsel can be heard, a motion will be made in the above cause that —, the receiver appointed in this action, be discharged; and that on an accounting by him, and a delivery of all property and other things held by him as receiver, to be made as the court may direct, the bond entered into by him, the said receiver, and his sureties, may be vacated (and that the plaintiff may pay him, the said receiver, the sum of — dollars due to him by order of the — court, dated the — day of —, 189—), and for the costs of this motion.

Dated —, 189—.

Receiver.

No. 59.

ORDER TO SHOW CAUSE WHY RECEIVER SHOULD
NOT BE DISCHARGED.

(TITLE.)

On reading the petition and affidavit of —, verified the — day of —, 189—, praying for the removal of —, receiver herein, and on motion of —, attorney for said —;

It is ordered that the said — herein show cause by the — day of —, 189—, at — o'clock in the — noon, or as soon thereafter as he can be heard, why he, the receiver herein, should not be discharged and turn over the possession of all the property of which he is receiver, and all which has come to his possession as such, to said defendants, together with all papers, leases and documents relating to such property, or to the tenants and terms of occupation thereof.

No. 60.

NOTICE OF MOTION OR PETITION TO DISCHARGE
RECEIVER AS TO SPECIFIC PROPERTY.

(CAPTION.)

To —:

You are hereby notified that on the — day of —, 189—, at — o'clock in the — noon, that I will file in the — court, in the above proceedings, a motion to vacate so much of the order made the — day of —, 189—, for the appointment of a receiver herein, as directs the said receiver to take possession of or administer any property belonging to the said — Company, or to in any manner take possession of or to operate the said line of railroad built by the said last-named railroad corporation under the charter thereof, or the equipments or assets thereof, and for such other or further order as may be just (and as will give your petitioners the full benefit of their rights as creditors of said — Company).

No. 61.

ORDER THAT RECEIVER PAY OVER FUNDS TO
HIS SUCCESSOR.

(TITLE.)

It is ordered that the said —, within — days from the service upon him of a copy of this order, pay over to —, as receiver of —, the sum of — dollars, together with the further sum of — dollars, the costs of his motion, amounting in all to the sum of — dollars.

No. 62.

AFFIDAVIT TO OBTAIN ORDER TO SHOW CAUSE
WHY A REMOVED RECEIVER SHOULD NOT BE
PUNISHED FOR CONTEMPT FOR A FAILURE TO
PAY OVER FUNDS.

STATE OF —, }
— COUNTY. } ss.

(CAPTION.)

—, being duly sworn, says:

That on the — day of —, 189—, this affiant was appointed receiver in the above-entitled cause by the said court, for and instead of —, who had been previously removed by said court.

That on the — day of —, 189—, this affiant entered into a bond, with sureties, in the sum of — dollars, conditioned for the faithful discharge of his duties as such receiver, which bond was duly approved by said court.

That by order of said court so removing said —, he, the said —, was ordered and directed to turn over to this affiant the sum of — dollars by the — day of —, 189—; (and a certified copy of said order was served on the said — on the — day of —, 189—.)

That on the — day of —, 189—, this affiant demanded of said — payment to him as receiver of the said sum of — dollars; that said — has not paid to this affiant the said sum or any part thereof, although the time limited in said order within which to pay the same has expired, and that the said — has failed to comply in every respect with said order.

(*Jurat.*)

No. 63.

AFFIDAVIT FOR CONTINUANCE OF ACTION
AGAINST RECEIVER INSTEAD OF AGAINST
CORPORATION.

STATE OF —, }
— COUNTY. } ss.

(CAPTION IN ORIGINAL ACTION FOR A RECEIVER.)

—, being duly sworn, says:

That he is the plaintiff in the action of — against the — Company now pending in this court.

That on or about the — day of —, 189—, an action was

commenced by — against the — Company in the — court (or in this court, the title whereof is — against —), to *(here state object, showing that it is not a demand which requires a separate trial).*

(State condition of the cause.)

That on the — day of —, 189—, deponent was served with a restraining order to show cause in this action, brought by — against the above-named defendant, for the purpose of dissolving the latter and for winding up its affairs, and that on —, 189—, the said company was so dissolved by order or decree of this court, and one — was constituted receiver of the property and effects of said company with the powers usual in such cases.

That affiant believes it is desirable, from the nature and importance of the questions involved, that the action referred to should be continued by substituting the said receiver as defendant, as proposed in said complaint.

(If order to show cause is desired, ask for it.)

No. 64.

PETITION BY RECEIVER THAT HE BE SUBSTITUTED FOR A PARTY IN AN ACTION WHICH WAS PENDING WHEN HE WAS APPOINTED.

(CAPTION.)

To the — Court:

Your petitioner, upon his oath, says:

That by order in the above-named cause, made the — day of — last, your petitioner was duly appointed receiver of *(briefly indicating what).*

(Or, were appointed in supplementary proceedings:) That on the — day of —, 189—, upon application duly made by —, a judgment creditor of the above-named —, in proceedings supplementary to execution, your petitioner was, by order of the — court, duly appointed receiver of the property of said —.

That thereafter he duly qualified as such, and entered on his duties as such, and now is such receiver.

(Allege pendency and nature of action; and of defense, if at issue, and condition of cause and other matters.)

Wherefore, your petitioner asks leave to prosecute *(or, defend)* said cause, and that for that purpose he be substituted as plaintiff *(or, defendant)* in place of said *(name)* and for such other or further relief as may be just.

No. 65.

ORDER TO SHERIFF TO WITHDRAW LEVY.

(TITLE.)

It appearing by the affidavit of ——— that ———, the sheriff of this county, has made a levy upon certain property in the hands of the receiver in this action without leave of court, it is ordered that he withdraw the same forthwith.

It is further ordered that said ——— appear before this court on the ——— day of ———, 189—, and show cause why an attachment should not issue against him as for a contempt of court in making said levy.

No. 66.

SPECIAL ORDER FOR RECEIVER TO BRING SUIT.

(TITLE.)

It appearing to the court that ——— is indebted to the Company, the defendant herein, in the sum of ——— dollars (*or show some cause of action*), the court, on the application of ———, receiver herein, authorizes and directs him to bring an action against the said ——— for the recovery of the said ——— dollars, with interest thereon (*or state other object of the suit*).

No. 67.

COMPLAINT BY CREDITOR ON BOND OF RECEIVER
FOR FAILURE TO PAY MONEY.

(CAPTION.)

(*Commencement.*) That on the ——— day of ———, 189—, ——— began in the ——— court of the state of ——— a suit against the ——— Company for the appointment of a receiver, and such action was thereafter had that the defendant ———, on the ——— day of ———, 189—, was appointed by said court receiver of said ——— Company, and on the ——— day of ———, 189—, he, with his codefendants as sureties, executed his bond, a copy of which is hereto annexed, marked "EXHIBIT A," and made a part hereof, to the approval of said court, and he at once entered upon his duties of said trust.

That on the ——— day of ———, 189—, said ——— was, by an order of said court, duly ordered to convert all the property of said ——— Company, of whatsoever kind, into money by sale thereof, which he did in due course of time, receiving therefor

—— dollars, and so reporting to the court, which report was duly approved.

That on the —— day of ——, 189—, the relator filed with said receiver his claim for —— dollars against said —— Company, which was duly allowed by said court as a valid and existing claim against said trust.

That on the —— day of ——, 189—, said ——, as such receiver, filed with the court his final report in the matter of said receivership, which report, in due course of time, was duly approved by said court.

That in said report said receiver showed that among the other creditors of said —— Company the relator was entitled to receive of the funds of said receivership, as his proportionate share thereof, the sum of —— dollars; and said receiver was directed by said court to pay said sum to the relator, along with the other creditors.

That on the —— day of ——, 189—, the relator demanded of said —— the payment of said sum of —— dollars, but he has failed and still fails (and refuses) to pay the same (and has converted said amount to his own use and benefit).

(Prayer and exhibit.)

No. 68.

DECLARATION ON ASSESSMENT AGAINST STOCK-HOLDERS OF NATIONAL BANKS.¹

CIRCUIT COURT OF THE
UNITED STATES,
—— DISTRICT OF ——,
—— DIVISION. } ss. —— Term, A. D. ——.

——, as receiver of the ——, plaintiff, by ——, his attorneys, complains of ——, defendant, on a plea that he render to the plaintiff the sum of —— dollars, which he owes to and unjustly detains from him.

For that, whereas, heretofore, to wit: on the —— day of ——, A. D. ——, the —— National Bank was organized as a national banking association under the laws of the United States with a capital stock of —— thousand dollars divided into —— thousand shares of one hundred dollars (\$100) each, and the Comptroller of the Currency of the United States did, pursuant to law, on, to wit: the —— day of ——, give to said —— National Bank a certificate under his hand and official seal that said —— National Bank had complied with all the provisions of law

¹ By permission of Messrs. Duncan & Gilbert.

required to be complied with before commencing the business of banking, and that such association was authorized to commence the business of banking, and thereupon said — National Bank did commence the business of banking under and in pursuance of the laws of the United States.

And the plaintiff further avers that on, to wit: the — day of —, said — National Bank, being then insolvent, suspended business and the payment of its obligations, and afterward, to wit: on the — day of —, one — was, by the Comptroller of the Currency of the United States, in pursuance of the laws of the United States, duly appointed receiver of said — National Bank and entered upon the discharge of his duties as such receiver.

And the plaintiff further avers that thereafter, to wit: on the — day of —, it appeared to the satisfaction of the Comptroller of the Currency of the United States that, in order to pay the debts of said — National Bank, it was necessary to enforce the individual liability of the stockholders thereof, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States, to the extent of — dollars upon each and every share of the capital stock of said — National Bank held or owned by them at the time of its failure, and thereupon the said Comptroller of the Currency of the United States did on, to wit: said — day of —, make an assessment and requisition upon the shareholders of the said — National Bank for — thousand dollars, to be paid by them ratably on or before the — day of —, and did direct the said —, as receiver as aforesaid, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

And the plaintiff further avers that the defendant, at the time the said — National Bank suspended business and the payment of its obligations as aforesaid, to wit: on the — day of —, was the owner and holder of — shares of the capital stock of said — National Bank, by means whereof, and by force of the laws of the United States, the defendant then and there became liable to pay to the plaintiff the amount of said assessment and requisition upon him as aforesaid, being the sum of — dollars, said amount being — dollars upon each share of the capital stock of said — National Bank, owned and held by said defendant at the time said — National Bank suspended business and the payment of its obligations as aforesaid.

Yet the defendant, though often requested, has not paid the said sum of money or any part thereof, to the plaintiff, but so to do wholly refuses, to the damage of the plaintiff, as aforesaid, of — dollars, and therefore he brings his suit, etc.

UNITED STATES OF AMERICA, }
 — DISTRICT OF —, } ss.
 — DIVISION.

— being duly sworn, on his oath deposes and says that he is the receiver of the — National Bank, the plaintiff in the above cause; that the demand of the plaintiff is upon the cause of action set forth in the foregoing declaration and that there is due to the plaintiff from the defendant upon said cause of action, after allowing the defendant all his just credits, deductions and set-offs, the sum of — dollars as debt and interest on said sum at the rate of five per cent per annum from the — day of —, as damages for the detention thereof.

Subscribed and sworn to before me this }
 — day of —, A. D. —. }

Notary Public.

No. 69.

DECLARATION ON PROMISSORY NOTE.

WITH CONFESSION OF JUDGMENT AND AFFIDAVIT OF SIGNATURE.

DISTRICT COURT OF THE }
 UNITED STATES, } ss. — Term, A. D. —.
 — DISTRICT OF —,
 — DIVISION.

—, Receiver of the —, a national banking association organized and doing business under the laws of the United States, plaintiff in this suit, by —, his attorneys, complains of —, defendant — in this suit, in a plea of trespass on the case upon promises.

► For, that, whereas, the said defendant — heretofore, to wit: On the — day of —, A. D., —, at —, to wit: at the — District of —, aforesaid, made — promissory note— in writing, bearing date on the day and year aforesaid, and then and there delivered the same to said the —, in and by which said note— said defendant by the name and style of —, promised to pay to the order of said the —, after date, the sum of — dollars, at the —, with interest at the rate of — per cent per annum after — until paid, for value received. And the said the —, to whom or to whose order the said note was payable, afterwards, to wit: on the — day of —, A. D. —, became and was insolvent, and the plaintiff on said day was by the Comptroller of the Currency of the United States duly appointed and commis-

sioned under the laws of the United States as Receiver of said —, by means whereof and by force of the statute and laws of the United States in such case made and provided the said defendant— became liable to pay to the plaintiff the said sum of money in the said note— specified, according to the tenor and effect of said note—, and being so liable the said defendant—, in consideration thereof afterwards, to wit: on the same day and year and at the place aforesaid, undertook and then and there faithfully promised said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note— specified, according to the tenor and effect of said note— and the statute and laws of the United States as aforesaid.

Yet the defendant—, although often requested, etc., ha— not yet paid the said sum of money or any part thereof to the said plaintiff, but so to do ha— hitherto wholly refused and still do— refuse, to the damage of the plaintiff of — dollars, and therefore he brings suit, etc.

Plaintiff's Attorneys.

DISTRICT COURT OF THE
UNITED STATES,
— DISTRICT OF —, } ss. — Term, A. D. —.
— DIVISION. }

 etc.

_____ }

And the said — defendant— in the above-entitled suit, by — attorney—, come— and defend— the wrong and injury when, etc., and waive— service of process, and say— that — cannot deny the action of the said plaintiff nor but that — the said defendant— did undertake and promise in manner and form as the said plaintiff has above complained against —, nor but that the said plaintiff has sustained damages on account of the nonperformance of the several promises and undertakings in the said declaration mentioned, including the sum of — dollars for his reasonable attorneys' fees for entering up this judgment over and above his other costs and charges by him about his suit in this behalf expended to the amount of — dollars and — cents, and the said defendant— further agree— that no writ of error or appeal shall be prosecuted on the judgment entered by virtue

hereof nor any bill in equity filed to interfere in any manner with the operation of said judgment, and that — hereby release— all errors that may intervene in entering up the same or issuing the execution thereon, and consent— to an immediate execution upon said judgment.

Defendant's Attorneys.

STATE OF —, }
— County. } ss.

_____, being duly sworn, on his oath deposes and says that he is a resident of — County, —, and is acquainted with the handwriting of —, whose name— signed to the annexed note and power of attorney and that the signature— of said — to the said note and power of attorney— the genuine signature— of —.

Subscribed and sworn to before me }
this — day of —, A. D. —. }

Notary Public.

No. 70.

PETITION OF RECEIVER OF NATIONAL BANK TO COMPROMISE WITH SHAREHOLDER.¹

STATE OF —, }
COUNTY OF —. } ss.

In the — Court, thereof.

In the matter of the
— NATIONAL BANK OF —, } Gen. No. —.
In Liquidation. } Term No. —.

To the Honorable Judges of said Court:

Your petitioner, —, receiver of the — National Bank of —, respectfully shows that said — National Bank of —, being a national banking association duly organized under the laws of the United States, having on or about the — day of —, A. D. —, become insolvent, your petitioner was by the —, Comptroller of the Currency of the United States, on or about the — day of —, A. D. —, duly appointed receiver of said — National Bank of —, and entered upon the discharge of his duties as such receiver and is still so acting.

¹By permission of Messrs. Duncan & Gilbert.

Your petitioner further shows to the court that on —, upon a proper accounting made by your petitioner and upon a valuation of the uncollected assets remaining in the hands of your petitioner, it appeared to the satisfaction of said Comptroller of the Currency, that in order to pay the debts of said — National Bank it was necessary to enforce the individual liability of the shareholders of said bank as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States, and that, by virtue of the authority vested by law in the said Comptroller of the Currency, the said Comptroller of the Currency did make an assessment and requisition upon the shareholders of said — National Bank of — for — thousand dollars, to be paid by them ratably on or before the — day of —, A. D. —, and said Comptroller of the Currency did make a demand upon each and every one of said shareholders for — dollars upon each and every share of the capital stock of said — National Bank held and owned by said shareholders, respectively, at the time of the failure of the said bank; and that your petitioner, as receiver, was directed by said Comptroller of the Currency to take all necessary proceedings, by suit or otherwise, to enforce to that extent the individual liability of the said shareholders.

Your petitioner further shows that —, of —, is a shareholder in the — National Bank to the amount of — shares of the par value of — hundred dollars, and that there is due to your petitioner, as receiver, the sum of — hundred dollars, with interest, being the — per cent assessment on the said — shares of stock standing in the name of said —.

Your petitioner further shows that he has made diligent effort to collect the amount due upon said assessment, but has been unable to collect anything from the said —.

Your petitioner further shows that he has carefully investigated the financial standing of said —, and is satisfied that said claim cannot be collected from said — by means of legal proceedings.

Your petitioner further shows that the amounts due upon said assessments are bad and doubtful debts within the meaning of section 5234 of the Revised Statutes of the United States.

Your petitioner further shows that the said — has offered your petitioner the sum of — hundred dollars cash in full settlement of all claims the of — National Bank of —, or your petitioner, as receiver thereof, may have on account of said assessment of — per cent upon the — shares of stock standing in the name of said —.

Your petitioner further shows that after having fully considered said proposition your petitioner is of the opinion that it is for the best interests of the creditors and shareholders of said — National Bank of —, that your petitioner be allowed to accept the offer of — hundred dollars cash of said —, in full

settlement and compromise of said — per cent assessment, and that more money can be realized upon said assessment on the stock of said —, by means of such compromise and settlement than your petitioner would otherwise be able to obtain.

Wherefore your petitioner prays that an order of court may be entered herein authorizing and directing your petitioner to accept said offer of — hundred dollars cash of said — in full settlement of said claim on account of said — per cent assessment.

And thus as in duty bound he will ever pray, etc.

Receiver of the — National Bank.

By _____
his Solicitors.

STATE OF —, }
County of —. } ss.

—, being duly sworn, on his oath says that he is the receiver of the — National Bank of —, that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein set forth are true to the best of his knowledge and belief.

Subscribed and sworn to before me }
this — day of —, A. D. —. }

Notary Public.

No. 71.

ORDER OF COURT AUTHORIZING COMPROMISE WITH SHAREHOLDERS.

STATE OF —, }
COUNTY OF —. } ss.

In the — Court thereof.

In the matter of the }
— NATIONAL BANK OF —, } Gen. No. —.
In Liquidation. } Term No. —.

This day comes —, receiver of the — National Bank of —, by —, his attorneys, and presents his petition asking for an order of court authorizing and directing him to settle and compound for — hundred dollars cash, to be paid by —, and all claims the — National Bank of —, or your petitioner as

receiver thereof, may have on account of the — per cent assessment made —, on the — shares of the capital stock of the — National Bank standing in the name of —.

The court having considered the said petition and the evidence adduced in support thereof, and being fully advised in the premises, finds that the best interests of the shareholders and creditors of the — National Bank of — require that such compromise and compound should be made.

It is therefore ORDERED, ADJUDGED and DECREED that your petitioner be, and he hereby is, authorized and directed to compound and settle, for — hundred dollars cash, any and all claims the — National Bank, or your petitioner as receiver thereof, may have on account of the said — per cent assessment on — shares capital stock of the — National Bank standing in the name of —, and this order is to operate as a full release of any and all claims your petitioner may have by reason of said claim on account of said — per cent assessment.

Entered by Judge —, October —, A. D. —.

APPENDIX

OF RECENT CASES DECIDED OR REPORTED SINCE THIS WORK
WENT TO PRESS.

APPOINTMENT OF RECEIVER—LIABILITY FOR RENT.

In *Olmstead v. Distilling & C. F. Co.* 73 Fed. Rep. 44, under the Illinois Statute providing that corporations organized under the general statute whose powers have expired by limitation or otherwise shall continue their corporate capacity for two years for the purpose of settling up their affairs, etc., it was held that upon a judgment of ouster in *quo warranto* proceedings the corporation becomes a trustee for its creditors and stockholders so that equity has jurisdiction on the ground of trust relationship of a suit by a stockholder in behalf of himself and other stockholders who may join with him for the appointment of receivers to administer its assets under proper averments.

Even when a receiver is appointed for the corporation upon an erroneous assumption of the court that the bill discloses an equitable jurisdiction, such appointment cannot be questioned collaterally.

In the above case, on an intervening petition filed, Judge Shewalter recently held, in an opinion not officially reported, that the receiver of a corporation was not liable for rents due upon leased property held by the corporation at the time of his appointment for a period longer than two years after the judgment of ouster of the corporation.

That at the expiration of the two years provided by the statute the corporation as an entity ceased to exist and its leases fell with the corporate existence.

SAME—OF RENTS AND PROFITS.

In *Scott v. Hotchkiss* (Cal.) 47 Pac. 45, a mortgage provided that in case of foreclosure a receiver might be appointed of the rents and profits. It was held that in the absence of the affidavit

required in mortgages of growing crops, such mortgage did not entitle the receiver to a crop growing on the land in the possession of a tenant, but only to so much thereof as was duly reserved for rent. On an allegation that the security was insufficient it was held the court was authorized to appoint a receiver in accordance with the stipulations of a mortgage as against the claims of a purchaser without notice.

SAME—ON APPLICATION OF MORTGAGEE.

In *Farmers' Loan & T. Co. v. Hotel Brunswick Co.* 42 N.Y. Supp. 350, it was held that where a receiver has been appointed in voluntary proceedings to dissolve a corporation the same receiver should be appointed on a subsequent application by the holder of a chattel mortgage on the property of the corporation for the appointment of a receiver, unless it appears that the lien of the mortgagee will receive adequate protection by the order already made.

SAME—ON EX PARTE APPLICATION.

In *Pearson v. Kendrick* (Miss.) 21 So. 37, the Code required the party making an *ex parte* application for a receiver to give the adverse party a bond conditioned to pay all damages that might be sustained if the appointment was revoked and providing that such damages might be recovered in the same manner as damages on an injunction bond. An order discharging the receiver appointed *ex parte* was held to be appealable.

In the same case it was held, under § 574 of the Code authorizing the appointment of a receiver without notice and under § 922 permitting chancellors of other districts than that in which the suit is pending to act, the appointment of a receiver by a chancellor of another district will be presumed to have been made upon a sufficient hearing.

SAME—ON APPLICATION OF WIFE.

In *Murray v. Murray* (Cal.) 47 Pac. 37, it was held that in a wife's action for maintenance without divorce under Civil Code, § 137, where purely legal proceedings are inadequate the action carried with it the right to have a receiver appointed under the general provisions of Code Civ. Proc. § 564. The wife's claim for maintenance is within the general powers of a court of

equity to grant not depending on a statute, and since the plaintiff's demand may be charged specifically upon the defendant's property, described in the complaint, the court had the power to appoint a receiver at the beginning of the action. It is also held that where the defendant is a nonresident by means of the receiver's possession the court acquires jurisdiction to subject the property seized to the satisfaction of its lawful judgment.

SAME—IN CASE OF INSANITY.

In *Re Hybart* (N. C.) 25 S. E. 963, it was held, under the Act of 1889, a receiver might be appointed for an insane person on motion, after due and proper notice.

SAME—WHEN VALID.

In *State, Amsterdamsch Trustees Kantoor, v. Spokane County Super Ct.* (Wash.) 47 Pac. 31, it was held that § 326, subs. 3 and 5, of the Civil Code authorizing the appointment of a receiver where it appeared that the property or fund in controversy is in danger of loss or removal or where a corporation has been dissolved, or is insolvent or in danger of insolvency, or has forfeited its corporate rights, a receiver could not be appointed *ex parte* to take charge of the business of an organization exercising corporate rights without authority. Such appointment can be made only after proceedings under Code Proc. §§ 688, 689.

SAME—WHEN VOID FOR WANT OF BOND.

In *Dreyspring v. Loed* (Ala.) 21 So. 73, where the statute provided among other things that an order appointing a receiver "must require complainant to enter in a bond," etc., it is held mandatory and prohibitory and where the order merely requires the receiver to give bond, the appointment is void.

SAME—WHEN VOID AS TO PARTIES IN POSSESSION.

In *Hall v. Donovan* (Mich.) 69 N. W. 643, an action was brought under the statute relating to voluntary assignments and which authorizes holders of preferred claims to bring an action in case of fraud and apply for a receiver, an order made *pendente lite*, appointing a receiver and requiring defendants to deliver to him all property owned by persons named, in possession of other defendants as mortgagees was held to be erroneous, if not a nullity.

BOND OF RECEIVER—LIABILITY OF SURETIES.

In *Black v. Gentry* (N. C.) 26 S. E. 43, it is held that the liability of sureties on receiver's bond is properly enforced in an independent action against them; that where judgment has been recovered against the receiver he is not a necessary party to an action against the sureties on the bond; and in such case it is not necessary to allege leave of court to sue.

CERTIFICATE OF RECEIVER.

In *Illinois Trust & S. Bank v. Pacific R. Co.* (Cal.) 47 Pac. 60, it was held that where the court, under circumstances apparently authorizing its action, takes possession of a street railway through a receiver, certificates issued under the order of the court must be regarded as valid, even though there may have been a failure of jurisdiction as to the rightful owner of the road. It will be presumed, in the absence of evidence to the contrary, that there was shown everything necessary to authorize the court in the issuance of certificates. It was also held in the same case that an order appointing a receiver cannot be collaterally attacked on the ground of failure of jurisdiction.

COMPENSATION OF RECEIVER.

In *Mann v. Poole* (S. C.) 26 S. E. 229, it is held that the compensation of a receiver is in the discretion of the court.

DISCHARGE OF RECEIVER—RESCINDING ORDER OF APPOINTMENT.

On the dismissal of the action in which the receiver is appointed the order appointing the receiver should also be rescinded. *Campbell v. Eversole* (Ky.) 38 S. W. 486.

SAME—SUIT AGAINST COMPANY AFTER.

Where a railroad company procures or acquiesces in the withdrawal of the receivership and the discharge of the receiver and the cancelation of his bond and accepts the property of the road which has been increased in value by the receiver, such railroad may be sued in assumpsit on a claim which was valid against the receiver. *Texas & P. R. Co. v. Manton* (U. S. Sup. Ct.), *Advance Sheets*, Feb. 1, 1897, p. 235.

SAME—WHAT NOT GROUND FOR.

In *Farmers' Nat. Bank v. Backus* (Minn.) 69 N. W. 638, in

an action to foreclose a mortgage a receiver was appointed to collect the rents of mortgaged premises and apply them in payment of delinquent taxes due on a prior mortgage. It was held that the fact that, pending the action, the holder of the first mortgage paid the delinquent taxes, added the same to the amount due on his mortgage, foreclosed, and bid in property for the full amount due him, was no ground for the discharge of a receiver.

LIABILITY OF RECEIVER—ON LEASE.

Where there is no act of disaffirmance by the receiver and he continues to hold the leasehold property and completes his term he must pay the contract price for rentals. *Spencer v. World's Columbian Exposition* (Ill.) 45 N. E. 250.

SAME—ON NOTE NOT COLLECTED.

In *Neel v. Carson* (Ky.) 37 S. W. 949, where there was nothing to show that the receiver had been ordered to collect a certain note and that the maker had become insolvent and had committed waste upon the land held as security for the note, it was held that in the absence of fraud, the receiver could not be held liable for the note.

SAME—NOT FOR WAGES FORMERLY EARNED.

In *Franklin Trust Co. v. Northern Adirondack R. Co.* 42 N. Y. Supp. 211, a receiver was appointed in an action to foreclose a mortgage on a railroad. He paid out a portion of the earnings for repairs, taxes, and in making final payment on a contract made for the preservation and protection of the property. It was held that the receiver was not liable to the employees for wages due at the time of his appointment where the order appointing him made no directions to pay such claims and they are not presented until after the money had been disbursed. Laws of 1885, chap. 376, authorizing the receiver to pay certain wages for labor, does not apply to temporary receivers for a railroad in an action of foreclosure.

POWER OF RECEIVER—OF CORPORATION; LIABILITY OF STOCKHOLDERS.

In *Minneapolis Baseball Co. v. City Bank* (Minn.) 69 N. W. 331, it is held that a receiver in an action to sequester the assets of an insolvent corporation under Gen. Stat. 1894, chap. 74, has

no authority, except as given by statute, to enforce the individual liability of stockholders.

SAME—TO SELL ASSETS.

In *Ackerman v. Ackernan* (Neb.) 69 N. W. 388, where a decree required a receiver to sell assets of an insolvent firm on a day named it was held that the receiver had no authority to sell at a day later than that fixed by the court and if he did so the sale was void.

SAME—TO SUE.

In *Schultz v. Phenix Ins. Co.* 77 Fed. Rep. 375, the receiver of a corporation was ordered and empowered to get in the assets of the company and for that purpose to bring such suits as might be necessary. It was held that the receiver could sue in a Federal court upon a contract for insurance made with the company.

SALE BY RECEIVER—LIABILITY OF PURCHASER.

A purchaser at a receiver's sale is estopped to deny liability for the receiver's expenses on the ground that they were made without order of court. *Heisen v. Binz* (Ind.) 45 N. E. 104.

SAME—RIGHT TO WITHDRAW BID.

In *Interstate Nat. Bank v. O'Dwyer* (Tex.) 38 S. W. 368, where an order directed the sale of property of a corporation in the hands of a receiver, provided that on receipt of a certain amount in cash the remainder might be paid in approved claims against the corporation and under such order a creditor became a purchaser of the property, it was held that the purchaser might withdraw his bid for the property where he acted with diligence in ascertaining the condition of the property sold by the receiver, and the liabilities thereon.

SUIT BY RECEIVER.

He must show in his complaint leave of court to sue. *Rhodes v. Hilligoss* (Ind.) 45 N. E. 666.

SAME—IN SUPPLEMENTARY PROCEEDINGS.

In *Tvedt v. Mackel* (Minn.) 69 N. W. 475, in a supplementary proceeding the receiver was held not to have power to assail conveyances on the ground offered under the allegations in the pleadings. But see *Sawyer v. Harrison*, 43 Minn. 297.

TEMPORARY RECEIVERS.

In *Citizens' Sav. Bank v. Wilder*, 42 N. Y. Supp. 481, a temporary receiver in an action to foreclose a mortgage, on the ground that service of summons by publication had been ordered, was held to be entitled to the mortgaged property, though the service by publication had not been completed.

TITLE OF RECEIVER.

In *Price v. Forrest* (N. J.) 35 Atl. 1075, a claim against the United States was ordered to be assigned by a debtor to a receiver in aid of proceedings instituted by a creditor to obtain satisfaction of a judgment at law recovered against the debtor. It was held that such an assignment to the receiver, or an assignment to him by operation of law by virtue of his appointment as such receiver, clothed the receiver with the right to take, receive, sue for, and distribute according to law, and the orders of the court from which he derived the appointment was an exception to the provisions of § 3477 of the Revised Statutes of the United States.

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